BUSINESS INTERRUPTION INSURANCE TEST CASE

DRAFT TRANSCRIPT

OF DAY 2 OF SUPREME COURT APPEAL (17 NOVEMBER 2020)

What follows is a **draft** transcript.

A final transcript will be published when it is available.

The Financial Conduct Authority vs. MS Amlin Underwriting Limited and others

Day SC2

November 17, 2020

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Tuesday, 17 November 2020

(10.33 am)

LORD REED: Welcome to the Supreme Court of the United Kingdom where we are today beginning the second day of the hearing in the proceedings between the Financial Conduct Authority and a number of insurance companies.

The basic issue in the proceedings is whether the insurers are under a liability to indemnify insured parties who took out business interruption insurance with them and then sustained losses as a result of the COVID−19 pandemic.

We're currently hearing arguments presented by the insurers and when we closed yesterday afternoon we were hearing Mr David Turner QC on behalf of Royal & Sun Alliance. I will turn now to Mr Turner.

Submissions by MR TURNER (continued)

MR TURNER: My Lord, last night I left RSA1 with just one further topic to cover which is the question of causation as it specifically relates to RSA1. In our written case at paragraph 75(b), the reference is {B/9/319} we suggest that for the purposes of testing causation under RSA1 it is sufficient to remove the disease within the specified proximity and any measures to contain it imposed as a direct consequence of the

local disease and specifically upon holiday rental accommodation.

Now, in its respondent's case, the FCA seizes upon what we say in paragraph 75(b) as being directly inconsistent with what Hiscox says in its case and one can see that in the footnote, footnote 438 to the FCA's case reference {B/10/468}, where the FCA says that Hiscox's position on its hybrid clauses is that one strips out the consequences of the restrictions, not the consequences of the disease.

Now, inevitably Mr Gaisman is right in his written case and I am wrong in mine. We were guilty, as is the FCA, of conflating two different causal enquiries. In the context of RSA1, there are two discrete steps, each is subject to the words "as a result of". The first step is to ask whether the disease within the specified radius proximately caused any relevant closure or restrictions placed upon the premises.

The second, and applying the contractual definition that one sees at {C/15/1186} to which I took you yesterday, that's the contractual definition of "loss of gross revenue", is to ask whether such closure or restrictions were the sole cause, and I emphasise "sole cause", of any loss of gross revenue. If and to the extent to which there was any concurrent cause of the

loss of gross revenue which could include the general presence of COVID−19 in the country and also include the presence of COVID−19 within the specified radius, (inaudible).

Sorry, was that my Lord Lord Briggs?

I will carry on if and to the extent to which there was any concurrent cause, including the general presence of COVID−19 in the country and also including the presence of COVID−19 within the specified radius, that's concurrent cause of the loss of gross revenue, then the answer to the second question could only be no, and we would test the position in this way.

It is or should be common ground that RSA1 does not provide cover for loss caused by disease in itself but only for loss caused by restrictions or closure placed on the premises caused by a disease within the specified radius. But if you conflate the two causal enquiries and thereby reverse out disease in its entirety, the effect would be to reduce the causal linkage between the loss and the restrictions to the status of a proviso.

I suspect Mr Gaisman will have more to say on that subject and how one approaches the question of causation in hybrid clauses.

Could I turn then to RSA3, which is the Eaton Gate commercial combined wording, and one finds that wording

in {C/16/1200} for those using tabs and it starts at −− my Lord, I am getting feedback because I suspect someone is not muted. It starts at page 1200.

My Lord, by a way of summary our position −− my Lord Lord Leggatt.

LORD LEGGATT: I am a bit slow and behind you, Mr Turner, but did I understand the gist of what you've just said to be, before you moved on, that if there were restrictions that were a result of both cases within the radius and cases outside the radius, to the extent that those restrictions would have been imposed because of COVID outside the radius anyway, cover is defeated?

MR TURNER: Yes, because the "but for" test is not satisfied at the link between the restrictions and disease.

LORD LEGGATT: That is so, is it, on your case even if the cases within the area, let's suppose hypothetically, would have been sufficient on their own to result in the restrictions?

MR TURNER: Yes.

LORD LEGGATT: That is a counter−intuitive result, isn't it?

MR TURNER: Well, we say that is a consequence of applying the "but for" test, my Lord.

LORD LEGGATT: Perhaps that's a reason why we should look pretty closely at the trend clause and see whether that is really how it is to be construed, or maybe somebody

else is dealing with that particular aspects.
MR TURNER: With RSA1 there is no trends clause, it is purely the definition of loss of gross revenue which requires that the sole cause of the loss be the insured peril by the time one has manipulated the wording.
LORD LEGGATT: Right, okay.
MR TURNER: My Lords, RSA3, by way of summary, the first point by way of summary is that disease cover is provided again only as an adjunct to the primary business interruption cover which is itself parasitic upon insured material damage to or loss of the insured's property.
Secondly, this policy only responds to the consequences of a notifiable disease either at the premises or within the specified radius of the premises. Insofar as the disease is outside the specified radius, then it does not form part of the insured peril.
Third, loss due to epidemic is excluded from cover; and fourth, to the extent that it matters, the word "following" should be construed as requiring as a minimum "but for" causation, we say it should be construed as requiring proximate causation.
Can I take you to the relevant policy terms and if we start at {C/16/1201} you'll see the contents list. Notably missing from the contents list is section 2

which is, in fact, the business interruption cover but you will see that there are various types of cover provided by means of different sections each of which is operative only if indicated in the schedule. So again we have a composite policy.
The first section is "property damage cover" followed by "business interruption cover" which, before one comes to its extensions, is parasitic upon the insured property damage cover. Provision is also made for employers and public liability covers as well as a number of standard bolt-ons, such as goods in transit, money and assault and commercial legal expenses.
Again we see a one-document provision on page 1202 {C/16/1202} which refers specifically to the general exclusions in the context of the entire policy being read as one document. On page 1207 {C/16/1207} at the top of the page, you will see again a signpost towards the general exclusions, to which the reader is encouraged to pay special attention.
Section 2 "Business interruption" starts at page 1231 {C/16/1231} and one finds out halfway down the page on page 1231. Section 2 "Business Interruption" and the second set of bold text draws specific attention to general exclusions which apply to this section.
The definition of "Business Interruption" or the

standard definition is to be found at the bottom of 1231 {C/16/1231} and, going over to page 1232 {C/16/1232}, is damage-based, as one would expect. There is a definition of "Incident" which is relevant because trends provision refers to "incident" on 1232 {C/16/1232} and again the definition of "incident" is damage-based.
The BI insuring clause, the main BI insuring clause, is at page 1233 {C/16/1233}, the third block of text under the heading of "Cover". That refers to business interruption, so the standard BI insuring clause is through the reference to the defined term of "business interruption" referring effectively to insured damage.
Basis of claim settlement starts on 1233, slightly lower down {C/16/1233} and there is a trends provision. I will just check the reference for that.
(Pause)
My Lord, I will come back to the reference. Sorry, the trends provision actually is where you would not expect it to be, it's at the top in between the heading for "The definition of vicinity" on page 1233 and the insuring clause. So there's a special provision tucked away without its own heading which is a trends provision and the trends provision is in standard form but refers

to an incident.
Again it is common ground for the purposes of this appeal that the trends provision is to be read as if the word "incident" is replaced by a reference to the insured peril and that is to be discerned from the judgment below at paragraphs 119 to 122 {C/3/71}.
The infectious diseases extension starts at 1237, towards the bottom of the page. One can see the extensions start on page 1236 {C/16/1236} with a reference to cover being provided under the section being extended to include and these were automatic extensions where business interruption cover is provided.
Extension vii is the "Infectious Diseases" section. An indemnity:
"... in respect of interruption of or interference with the Business during the Indemnity Period following:
"(a) any:
"i. occurrence of a Notifiable Disease (as defined below) at the Premises or attributable to food or drink ...
"ii. discovery of an organism of the Premises ...
"iii. occurrence of a Notifiable Disease within a radius of 25 miles of the Premises ..."
And (b), (c) and (d) are familiar extensions, again

premises−related, which will be familiar to you and I will leave you to read, if I may.

The "Infectious Diseases" extension, so extension vii, whether it is dealing with infectious diseases or other aspects of infectious diseases, is subject to what are in fact special conditions but are preceded by the heading "Additional Definition in respect of Notifiable Diseases". The first is the definition of "Notifiable Disease" itself and that is in the same terms that you saw yesterday in relation to the Amlin policy.

The second reads:

"For the purposes of this clause:

"Indemnity Period shall mean the period during which the results of the Business shall be affected in consequence of the occurrence discovery or accident."

That's a reference back to the perils in the extension itself. And item 4 is:

"We shall only liable for the loss arising at those Premises which are directly affected by the occurrence discovery or accident ... "

Then what should be a separate special condition is a redefinition of the term "Maximum Indemnity Period".

Sectional exclusions appear at page 1240 {C/16/1240}. There are no relevant sectional

exclusions, but what is relevant is that where the sectional exclusions are introduced two−thirds of the way down page 1240 {C/16/1240} there is again then a reference to the need to see the general exclusions.

Next in time, page 1285 {C/16/1285} within the general terms and conditions of the policy, two−thirds of the way down under numbered general condition 10.9 but forming a separate unnumbered general condition is a general condition in relation to interpretation. Sub−condition (e) makes the point that "headings are for reference only and shall not be considered when determining the meaning of [the] Policy".

The general exclusions themselves start at page 1290 {C/16/1290} and again start with a reminder that those exclusions apply to all sections of the policy unless stated otherwise.

General exclusion L, which is the general exclusion with which we are concerned at 1292 {C/16/1292}, is to be found −− sorry, page 1292 starts with the rubric:

"Applicable to all sections other than Section 5 — Employers' Liability and Section 6 — Public Liability ... "

And then below that one sees the words "Contamination or Pollution Clause". My Lords, in the Divisional Court the FCA took the point that the words

"applicable to all sections other than section 5 and 6" were part of the heading and therefore one could discern from that that one was entitled to look at the headings, rather than being bound by what is said in the general conditions.

I, in our submission, those words "applicable to" precede but are not part of the heading, they are simply directory. The point taken by the FCA was, with respect, an example of what Aristotle might have the described as hair−splitting wordsmithery.

Under the general exclusion there are four provisions which are helpfully numbered (a), (b) and then (a), (b), so I will refer to the second (a) as "(a) bis" and the second (b) as "(b) bis".

(a) contains the operative exclusion:

"The insurance by this Policy does not cover any loss or Damage due to contamination pollution soot deposition impairment with dust chemical precipitation adulteration poisoning impurity epidemic and disease or due to any limitation or prevention of the use of objects because of hazards to health."

It might be observed that the draftsperson is obviously allergic to the use of punctuation.

(b) says that:

"The exclusion does not apply if such loss or Damage

arises out of one or more of the following Perils ... "

And I will leave you to read those.

And then we come to (a) bis:

"If a Peril not excluded from this Policy arises directly from Pollution and/or Contamination [with, 'pollution' capitalised and 'contamination' capitalised and both words in bold] any loss or Damage arising from that Peril shall be covered."

My Lords, I should observe at this stage that neither pollution nor contamination is a defined term in this policy and indeed those words are capitalised and emboldened at random in different places within the policy, sometimes they are capitalised, sometimes they're not, and sometimes they're emboldened and sometimes they're not and sometimes you get both or neither.

(b) bis is the final part of this exclusion:

"All other terms and conditions of this Policy shall be unaltered and especially the exclusions shall not be superseded by this clause."

Can I start next with the scope of the insured peril. The starting point, as my Lord Lord Hodge observed in Impact Funding Solutions at paragraph 7, the reference −− I don't ask you to turn it up −− is {G/60/1031}, where Lord Hodge said:

"The extent of [insurers'] liability is ... ascertained by reading together the statement of cover and the exclusions in the policy. An exclusion clause must be read in the context of the contract of insurance as a whole. It must be construed in a manner which is consistent with and not repugnant to the purpose of the insurance contract."

In our submission, that approach is consistent with that articulated more generally by Lord Justice Chadwick in Taylor v Rive Droite Music which you will find in bundle E, tab 39, page 1140 {E/39/1140} at paragraph 27, where he said in the context of potentially inconsistent clauses that:

"The court must start from the premise that the parties intended that effect should be given to each of the clauses in their agreement; so that 'to reject ...'"

And he at this stage quotes from Lord Goff's opinion in the Yien Yieh case, the Yien Yieh Commercial Bank case:

"... 'to reject one clause in a contract as inconsistent with another involves a rewriting of the contract which can only be justified in circumstances where the two clauses are in truth inconsistent' ...

As Lord Goff went on to say in the Yien Yieh case, and quoted by Lord Justice Chadwick:

"... the overwhelming probability is that, on examination, an apparent inconsistency will be resolved by the ordinary processes of construction."

Paragraph 40 in the same judgment {E/39/1143}, so the Taylor case, Lord Justice Chadwick went on to say that:

"The question, in each case, is whether the provisions can sensibly be read together; whether a reconciliation of the provisions can conscientiously and fairly be achieved."

I pause there to note that fairness, in our submission, connotes the principled application of the relevant rules of construction, not, as the FCA would have it, avoiding a result which one party doesn't like.

We say that the starting point, therefore, is to read the coverage clauses and the exclusion clauses together to ascertain the scope of the cover that's being provided under the disease extension. As to that, what we submit is that it is perfectly possible to construe the infectious diseases clause and exclusion L together. They give rise to a coherent scheme whereby the consequences of local occurrences -- and I use the word "local" as a convenient and relative shorthand and not as an invitation to the FCA to suggest that the effect of a 25-mile disease radius is not very local and

therefore must be taken to embrace the entire country -- whereby the consequences of local occurrences of disease within the 25-mile radius are covered, but the consequences of epidemics and of disease outside the specified radius are not. This, and only -- my Lord Lord Leggatt.

LORD LEGGATT: It's asking -- it's a totally unreasonable ask of the reader of the policy, isn't it, to expect somebody when they read the disease cover that they've got to construe that in the light of some small print that appears 50 pages later amongst general exclusions? It's an absurd approach to construction.

MR TURNER: Well, my Lord, I submit it's not and it's not because the reader's attention is drawn repeatedly to the general exclusions and to say that one shouldn't take account of the general exclusions because they are to be dismissed as small print is effectively to draw a red line through the general exclusions despite the fact that they are signposted repeatedly during the course of the policy. To dismiss --

LORD LEGGATT: Well, one way of approaching it is to say that when you read "epidemic" and "disease" here, you don't read it as cutting down the cover that you've already got in your disease clause (inaudible) applicable to other things.

MR TURNER: Well, there is nothing else to which the exclusion in respect to epidemic, with respect, could relate, and I'll come to it.

LORD LEGGATT: Throughout the entire policy?

MR TURNER: Not as far as I have been able to identify. No doubt Mr Edelman will correct me if I'm wrong --

LORD LEGGATT: Then why is it in the general exclusions and not put in the only clause you say it's relevant to?

MR TURNER: Well, my Lord, it could have been better expressed in the general exclusions, but it's not, it is where it is. That doesn't provide a justification for putting a red line through it. There is, in our submission, no authority that would support taking such an approach to general exclusions that effectively they are to be dismissed as small print, and that goes far beyond any principled approach to construction.

If I may, we say that on its face general exclusion L seeks -- my Lord Lord Briggs.

LORD BRIGGS: Yes, assuming that the two clauses can be read together in the way you say, what if the outbreak within the 25-mile radius is itself part of an epidemic? Does that mean that the epidemic exclusion excludes it or do you read them the other way round, that epidemics generally are excluded but not ones which happen within 25 miles?

MR TURNER: Only the latter because there is no -- there is -- sorry, epidemic generally is excluded. There is no cover for disease outside the 25 miles. So if one is seeking to give effect to the exclusion, we say that is how one construes it. We say --
LORD BRIGGS: But just so I understand, so if the occurrence within 25 miles it is part of an epidemic it's excluded, but if it's no part of an epidemic it's not excluded. Is that right?
MR TURNER: That is right.
LORD BRIGGS: How does one tell whether an occurrence is or isn't part of an epidemic?
MR TURNER: Well, that is, my Lord, a question of fact to be determined in any given case, but there may be issues as to whether something is an epidemic on the margins, but not in the context of COVID-19 and a worldwide pandemic which is simply an aggregation across the world of national epidemics.
LORD BRIGGS: Thank you.
MR TURNER: What we say is that on its face exclusion L seeks to exclude loss due to epidemic. We say that not all notifiable diseases have any obvious potential to result in something which can properly be characterised as epidemic and you were taken yesterday briefly by Mr Crane to the list of notifiable diseases which you

will find at the back of the regulations at {E/5/88} and you were taken there before an intervention that was both misconceived and unfair.
It was misconceived because what Mr Edelman had forgotten was that the ruling that he was referring to was made in respect of his attempt to call expert evidence as to the meaning or the likely epidemiological consequences of specified diseases within the Ecclesiastical policy as if the reasonable person reading that policy would have in his back pocket a very eminent epidemiologist to tell him what the potential implications were rather than relying upon the court as the proxy of the reasonable reader of the policy to understand what the implications of the specified diseases might be.
He was unfair because Mr Crane uniquely amongst the insurers' counsel in front of you was not aware of that particular genesis of the particular point and the court below held that Mr Edelman was seeking to introduce extraneous evidence to support his construction.
But if one looks at the list of notifiable diseases, there are a number which have no obvious potential to result in an epidemic. For example, acute encephalitis, rabies, tetanus and even malaria can be discounted as something which could realistically give rise to

an epidemic within the United Kingdom. And legionnaires', although you might get a number of people infected who have been to the same building being an environmental pathogen, legionella, the chance of that causing an epidemic are remote.
We say that the infectious diseases extension, so far as relevant, is intended to provide cover only for occurrences of an infectious disease either at the premises, subclause (a)(i) which the FCA accepts is a fortuity which is focused on the disease at the premises and not a wider outbreak -- it's respondent's case at paragraph 194 {B/10/394} -- or within 25 miles of the premises, and we say there is no clue in the language that allows a syntactical distinction to be drawn between the nature of the 25-mile radius peril and the peril at the premises.
If the 25-mile radius provision is construed as delineating cover for only a local outbreak of a notifiable disease, there is nothing inconsistent or remarkable about insurers wishing to exclude liability for an epidemic as a qualification to but far from a negation of the disease cover. It certainly can't be suggested that it is repugnant -- my Lord Lord Briggs, sorry.
LORD BRIGGS: So sorry. The exclusion in (a) isn't just of

epidemics, is it?
MR TURNER: No.
LORD BRIGGS: It's a comprehensive concept involving epidemic and disease or due to any limitation or prevention of use of objects because of the hazards to health. Are you sort of quietly accepting there may be some repugnancy and the rest of it but epidemic survives?
MR TURNER: Yes.
LORD BRIGGS: Or are you submitting the whole of the very broad ambit of that apparent exclusion?
MR TURNER: No, I accept that you can't read that clause as excluding liability for disease, full stop, because that would be in direct conflict with the disease cover and those two clauses could not live alongside each other in those circumstances. But the fact that one can't give effect to the exclusion in respect of disease does not inhibit one from giving effect to the exclusion in respect of epidemic.
LORD BRIGGS: Thank you.
MR TURNER: My Lords, as I was saying, it cannot be suggested it is repugnant to the disease cover for insurers to impose a qualification on the disease cover excluding liability for epidemic and indeed, if I could ask you to look at the FCA's respondent's case at

paragraph 191 {B/10/393}, what they say in terms is:

"It is rather that, in circumstances where the policies contemplate (and naturally include) disease outbreaks that could amount to a pandemic ..."

For relevant purposes that is to an epidemic because "pandemic" is an international concept:

"... if the parties intended that there would be effectively no cover for a pandemic disease when it becomes a pandemic disease, the policies would have said so."

It goes on to say there are various ways in which that could have been done. Just stepping back, we say there are the following pointers.

First, the policy repeatedly makes clear that the cover which it provides is subject to general exclusions. There are two such reminders within the business interruption section itself as well as at the beginning of the general exclusions and at the beginning of general exclusion L.

Second, the Divisional Court seems to have taken the view that an exclusion clause cannot be read so that it cuts down the specific covers provided in the insurance. Reference for that is judgment paragraph 115 {C/3/70}. But while it may be necessary to insure that exclusions are not repugnant to the cover provided, the fact that

an exclusion qualifies and therefore at least to some extent cuts down the cover otherwise provided is unremarkable. That is the purpose of an exclusion clause.

Third, given that general exclusion L does not apply to any liability covers within the policy, it is difficult, if not impossible, to see what other cover beyond the disease extension it might apply to.

As we've noted in our written case, the court approached the general exclusion having effectively already determined that it should adopt a construction of the disease extension which avoided the result that there should be no effective cover if the local occurrence were part of a wider outbreak; judgment paragraph 107 and following {C/3/68}.

Even if that were a tenable construction of the disease extension itself, it would not render the exclusion of epidemic repugnant so that it must be disregarded, but that is effectively what the Divisional Court did.

The reliance on subclause (a) bis and (b) bis -- and, my Lords, it may be helpful to have those available to you {C/16/1292} at this point -- provide no reason, we say, why the exclusion for epidemic should not be respected.

The reference to pollution or contamination cannot be read, or shouldn't be read, as encompassing everything in subclause (a). You can only get there if you read the words "pollution or contamination" in subclause (a) bis as referring to the heading of the disease exclusion -- sorry, the pollution or contamination exclusion. But you're not allowed to refer to the headings.

Second, pollution or contamination, as I've noted, are not defined terms. But even if the FCA were right to say that subclause (a) bis is to be construed as referring back to the entirety of subclause (a), the submission misunderstands the nature of that subclause, just as much as the Divisional Court was wrong to accept the argument advanced for the first time in the FCA's oral submissions below, that subclause (b) bis means that the terms of the exclusion are not intended to overwrite express grants of cover. Judgment paragraph 117 {C/3/70}.

The Divisional Court's approach would have the remarkable and, we submit with respect, nonsensical effect that having set out in subclause (a) a number of exclusions which could only be of relevance if and to the extent that they quantify express grants of cover, the parties then effectively draw a red line through the

entirety of that subclause by means of what is said in subclause (b) bis.

There is, we say, a clear and coherent structure to the general exclusion as a whole, even if the drafting could have been improved.

Subclause (a) sets out the exclusions from cover. They expressly apply to all sections save for liability sections. Subclause (b) sets out exceptions to those exclusions. Subclause (a) bis provides a write-back of cover in respect of non-excluded but ensuing causes. So where a peril not excluded arises directly from pollution and/or contamination, to use the words of the clause, then there's a write-back of cover.

Thus, by way of illustration, if contamination of electrical equipment with soot led to a short-circuit and a fire, the ensuing peril of fire would be covered, but -- and this is where subclause (b) bis comes in -- subclause (b) bis qualifies any such write-back by stipulating that it is subject to all other terms and conditions of the policy. But this is the purpose of (b) bis, is signposted, we say very clearly by the explicit emphasis in (b) bis to be found in the words "especially the exclusions shall not be superseded by this clause" and therefore the words "this clause" in (b) bis can only sensibly be a reference to (a) bis.

My Lords, the FCA invokes contra proferentem to avoid going down that process of construction. We say that that is an unprincipled approach if you get to a proper construction by applying the normal rules of construction, you don't have an ambiguity about the parties' agreement and therefore there is no scope for invocation of the contra proferentem principle and, just for your Lordships' reference, we rely on paragraph 13 of Lord Justice Auld's judgment in McGeown v Direct Travel {H/7/112}.

My Lord, on "following" I largely align myself with what Mr Kealey said yesterday afternoon. The FCA is right to concede that "following" connotes at least a causal requirement but it mischaracterises what that requirement is. The phrase —— the unhelpful phrase —— "looser causal requirement than proximate cause" is not only unhelpfully opaque, but it is actually, with respect, a mealy—mouthed way of suggesting that it indicates no requirement for any real causal relationship at all, whether proximate or "but for".

We rely upon what my Lord Lord Hodge said in McCann's Executors {E/43/1197}, for which you already have the reference, and we also say, like Amlin, that the word "following" has to be construed in its context.

For RSA3, the true meaning of the word "following"

and the necessary causal connection it connotes is signalled by clauses 2 and 4 of the so—called additional definitions, which refer to the results of the business being affected in consequence of the occurrence. Those are clear words requiring at least "but for" causation. We say that they are words consistent with proximate causation, and also in item 4, the loss arising at the premises directly affected by the occurrence.

We've set out our arguments there in paragraph 47 of our written case {B/9/309}.

The Divisional Court concluded that neither of those additional definitions indicated a requirement for proximate causation because, it said, the occurrences of disease would not have a direct effect on the business. Judgment paragraph 96 {C/3/65}.

With respect to the Divisional Court, that conclusion muddles both factual and legal causation. The logical consequence of the Divisional Court's analysis is that it would not matter what causal words were used because the effect on the business of the disease could only ever be indirect. But such an approach not only conflicts with section 55(1) of the Marine Insurance Act but it conflates proximate causation with being the last event in the causal chain.

So in RSA's submission, by way of conclusion, it

does not matter whether proximate or "but for" causation is required by the use of the word "following", the simple point is that neither requirement is satisfied unless the insured can establish that it would not have suffered the relevant interruption but for the occurrence of notifiable disease within the relevant radius.

My Lords, unless I can assist you further, those are my submissions.

My Lord Lord Briggs.

LORD BRIGGS: One final question. We are back to repugnancy again.

MR TURNER: Yes.

LORD BRIGGS: Might you know of any authority which assists on the question whether, when testing, whether clause (a) is repugnant with clause (b), you can do a sort of blue pencil test to the apparently repugnant clause so as to preserve such bits of it as may not be repugnant, or have you got to look at the clause as a whole?

MR TURNER: My Lord, the question is whether you can fairly read the two clauses alongside each other and that may involve elements of applying a blue pencil test because one may be writing down one of the clauses, but that is a preferable approach to simply taking a red pen and putting it through the entire clause. It's important to

note that exclusion L deals with many things in subclause (a). It doesn't just deal with disease, it deals with epidemics. It doesn't just deal with disease and epidemics, it deals with lots of other things and one is to be taken as inferring that the draftsperson expected or intended, subject to arguments about repugnancy and making sure that these clauses can live alongside each other, the parties to focus on those bits of the clause that are relevant in the particular context.

LORD BRIGGS: Thank you.

LORD REED: Well, thank you very much, Mr Turner. I think we turn next to Mr Gaisman QC on behalf of Hiscox.

MR GAISMAN: My Lords, can your Lordships see and hear me?

LORD REED: Yes, perfectly.

Submissions by MR GAISMAN

MR GAISMAN: Thank you. At this stage of the appeal there is a change of focus. We move away from disease clauses to a different type of clause. The clause is to be found at {C/6/401}. The operative Hiscox clause is not a disease clause, which is what the FCA originally called it and it's not much more informative to call it a hybrid clause. Not only is it not a disease clause, it is also not an emergency or a danger clause either although the FCA mixes it up in the discussion with

quite different clauses which expressly refer to those perils.

This confusion enables the FCA to claim that Hiscox's clause "responds to an external emergency in the world". FCA respondent case 387. The Hiscox's clause is what its title calls it: it is a public authority clause. I will use the abbreviation "PA". Its essential nature is to respond to PA restrictions imposed in certain circumstances, vermin, drains, food poisoning, disease, death by human hand.

The detection of mouse droppings in a leisure centre is not an external emergency in the world. The clause raises its own distinct questions both of construction and of causation. The first is obvious.

As to causation and the counterfactual, the court below essentially gave the same answer for all insurers. That does not have to follow. The insurers with disease clauses have made their own submissions and I adopt them where appropriate. Although I am the fifth counsel to address your Lordships, I am naturally only concerned with Hiscox's distinct position.

The structure and nature of the Hiscox's public authority clause give rise to a particular and, we submit, compelling argument that the court below constructed the wrong counterfactual in Hiscox's case.

The idea when it comes to Hiscox of relegating the public authority element in the public authority clause to a merely "adjectival" status —— FCA respondent's case para 428.1 —— that relegation is not possible as a matter of construction without eviscerating the clause.

Now, the FCA's appellant case, paragraph 29, and it's worth looking at this {B/2/39} justifies the decision of the court below on this very point in these terms underlining it:

"... the parties intended that the insured recover for losses that would have been incurred even without the public authority restrictions."

Para 29, my Lords.

Now, that is very striking. The FCA's contention is that the insured recovers under a public authority clause losses which would have occurred without the public authority restrictions. How can that be right? Hiscox's promise was to hold insureds harmless against loss caused by PA restrictions of certain types. What my Lord Lord Leggatt in Sartex called the specified loss or damage, emphasising the word "specified", paragraph 35 of that judgment.

Now those very public authority or PA restrictions are said to be inessential to the breach of the

insurer's promise to hold harmless against that "specified loss". It, the breach, occurs anyway. Now, whatever that contract is, my Lords, it's not a contract of indemnity.

The FCA is driven to argue the correctness of this proposition to support its own appeal on the pre—trigger downturn, but in the context of Hiscox at least it exposes the fallacy in the counterfactual which it advocated and which the court found. We call it the FCA's 13th chime point: see paragraph 132 of our respondent's case {B/2/70}.

One further introductory point. Whether and to what extent it was predictable that the UK would be hit by a serious outbreak of a notifiable disease. In the case of Hiscox, that is not the question. The Hiscox's clause, as we can see, insures against the consequences of PA restrictions of certain types. So the question is as to the extent to which the government reactions to the pandemic in March 2020 can have been objectively intended as risks which the parties were to insure at the time of contracting. The FCA inevitably admits that these actions were unprecedented in this country. It's respondent's case 156.

At 391 it implicitly recognises that the parties could not have had "this draconian legislation" in mind.

Mr Crane has covered this ground and I just make four points.

First, the FCA conflates the disease with the government reaction, saying that COVID is not different in kind from SARS. Respondent's case 391. That point may or may not be relevant to the disease clauses, but a clause insuring PA restrictions requires the parties to have intended those risks to be transferred and they were different in kind to anything previously known.

Second, even assuming that all the powers buried in the 1984 Act are to be treated as reasonably available to the parties, the question is not as to the existence of those powers, which are in the most general terms, but the possibility of their exercise in the way in which they have been. All that the FCA can say, respondent's case 159 is that while the regulations are unprecedented "they did not appear out of nowhere".

Third, I should draw attention —— I shall have to ask your Lordships to read this in your own time —— to paragraph 138 of the judgment {C/3/78} which expresses the matter much more guardedly, finding, as regards the disease clause, that all that could reasonably be expected at the date of the contract was that the outbreak of a SARS—like disease would have "an impact or some impact"; that is a very restricted finding.

Fourthly, as others have submitted, that a risk is foreseeable does not mean it is intended to be covered. That question is answered by the contract. In the case of Hiscox, this question arises in relation to what is conceded to be an extension to a property policy. It is easy to imagine a PA's reaction to legionnaires' disease in the waterworks of a property being a covered risk. Lockdown in the wake of a worldwide pandemic is totally different.

So much, my Lords, by way of introduction.

Given the very limited time, I have, I cannot cover all eight of our grounds of appeal orally. I will have to be selective and I will focus on the first five.

As to those which I do not cover, I naturally refer your Lordships to our written case, familiarity with which I also assume in the submissions which follow.

So I want to turn first to ground 5: is Hiscox 4 triggered? This is a coverage question. Questions of causation which arise in this question arise within the peril, and determine whether or not the peril has occurred.

The question is whether on their true construction Hiscox 4 policies respond to the March 2020 government measures. The Hiscox 4 policy contains a different PA clause to the one which I showed your Lordships. This

one has a within one mile stipulation. We may take as an example the wording at {C/22/1558}.

That wording has both an NDDA clause, a non−damage denial of access clause, which is at {C/22/1559} and a PA clause which is at {C/22/1560}, although this is only true of some Hiscox 4 policies, the fact that they also had an NDDA clause in.

Now, as your Lordships will have read in the judgment, the court held that the NDDA clause did not respond at all in any Hiscox policy for several reasons, as we will see, including the fact that nothing that occurred within the one−mile radius caused the government measures. We'll look at that in due course. That's judgment 418.

The FCA does not appeal against the NDDA clause holdings. However, the court held that the Hiscox 4 PA clause did respond.

Hiscox appeals against that conclusion. The court reached its conclusion with express hesitation. It was no doubt mindful of the fact that the Hiscox 4 PA clause has much in common with QBE3, which the court held fell the opposite side of the line, as well with the Hiscox NDDA clause, which fell the opposite side of the line. Whether the court was also affected by the temptation of elegance it would be presumptuous of me to say.

Now, Hiscox's argument proceeds in these stages. Some of these points have been made by others, but in the context of Hiscox 4, it is worth seeing just how many line up.

We've got {C/22/1560} I hope on the screen for those who are reading on the screen. First, the relevant element of the insured peril under Hiscox 4 is an occurrence of a notifiable disease within 1 mile of the business, and I will call that "the stipulated occurrence" because that's what it is.

Secondly, as has just been submitted, many notifiable diseases manifest themselves locally and not on a broad scale: legionnaires' disease; tetanus is a notifiable infectious disease; an outbreak of German measles at a school and so on.

So it is a serious exaggeration for the FCA's appellant case 134 to say that insurers' construction gives "illusory cover for notifiable diseases". It is also wrong, as we have seen, for the FCA's respondent's case 387 to describe Hiscox 4 as expressly contemplating a serious emergency.

Thirdly, the fact that the parties, as has been said before, may have contemplated that notifiable diseases could be local or widespread does not mean that they intended to cover all incidents of all such diseases.

That remains the question to be answered.

The FCA's respondent's case 312 recognises that local cases met by local measures may be "more typical". It then exaggerates by saying that:

"... the unique identifying characteristic [of notifiable diseases] is their possibility of spreading broadly ..."

Food poisoning is a notifiable disease, so is tetanus. Again, the FCA respondent's case 204 says:

"... disease outbreaks do not occur ... in a particular place."

Really? That's not right either. Only if you assume with hindsight that a pandemic, or something similar, is the paradigm or an epidemic is the paradigm.

Fourthly, my Lords, if we can go back to −− or perhaps we still have it −− 1560, {C/22/1560}. The public authority in this clause is the same type of PA as the one which imposes restrictions in the event of vermin, food poisoning, drains; in other words, a local authority reacting to a small−scale local event.

LORD REED: What about (a) murder or suicide?

MR GAISMAN: Well, the event may not be local, my Lord, but if the murderer, as it were, comes to a house which is near the premises, then the murderer is local. I accept that to that extent.

LORD REED: Well, all I had in mind was clearly it wouldn't be a local authority, it would be the police, presumably, who would ——

MR GAISMAN: Sorry, my Lord, I am using "public authority" —— I'm sorry, I did say "local authority" and of course I should have said "public authority", but it would be the local police force, my Lord, or it would be likely to be in the event of a murder or suicide.

My Lords, in our appellant's case 112, I haven't got time to take your Lordships through it, we analyse in detail the other covers within the clause (a) and (c), (d) and (e) and we show how, of their nature and by reference to the relevant legal powers, they contemplate small—scale local events. I hope paragraph 112 doesn't misspeak in the way that my Lord Lord Reed pointed out that I had had a moment ago in relation to the police.

The point here is expressed in the Latin maxim noscitur a sociis and the fact that the public authority is capable of including a government does not prove that this clause was meant to cover national events.

Fifthly, my Lords, Mr Salzedo addressed your Lordships on the meaning or the natural meaning of the word "occurrence" in the insurance context even before one gets to the one—mile limit as a textual indicator of specificity. He referred to the dictionary

and interestingly, I don't believe this has been resiled from, the FCA's skeleton below in footnote 329 equated the three terms "incident", "event" and, "occurrence" and of course your Lordships have been told about and indeed know about Axa v Field and Lord Mustill. This is also the ordinary way in which we use these words, to refer to something inherently particular and confined. As the Hiscox Action Group say —— and I gratefully adopt their submission —— the word "occurrence" is different from abstract, widespread concepts like "danger" or "emergency". They don't say that. What they do say in paragraph 39(1) is that "occurrence" is:

"Typically contrasted with a general state of affairs."

Like a pandemic.

Read without hindsight and in context, it would not naturally be construed as at applying to national states of affairs.

Now, the clause at 1560 {C/22/1560} does not refer to an outbreak, it refers to a notifiable human disease. On the previous page, the definition of a notifiable human disease is a disease an outbreak of which must be reported to the local authority. That doesn't advance the FCA's position, it's just describing what it is that has to be reported, what a notifiable disease consists

of. Anyway, of course, a single incidence of legionnaires' disease is an outbreak.

The judgment below, my Lords, provides some support for the submissions I am making because it was the very absence of the word "occurrence" in the Amlin clauses that assisted the court to hold that disease generally was covered there, not just local disease. That's judgment paragraph 196. And it is implicit that the converse is also true.

Sixthly, my Lords, while there is no conceptual difference between a one—mile radius and a 25—mile radius, the former is, in practice, a pointer towards the Hiscox parties intending to confine the occurrence to those of a strongly local character. The area is just over 3 miles; even I can work that out.

The court below expressly recognised the force of this point in relation to QBE3, which it held did not provide pandemic cover for this reason among others, 1 mile is not just a lot less than 25 miles, it's a clue to a different contractual intention. That's judgment paragraph 237 {C/3/104}.

It's simply not possible to regard this stipulation as merely adjectival and the court there didn't.

Seventhly, my Lords, many Hiscox policies, including that at {C/22/1558} have a "non damage denial of access"

clause. May we look at it, please {C/22/1559}. This also has a one—mile radius stipulation:

"An incident ..."

If your Lordships have it:

"... within a one mile radius ... which results in ..." the imposition of certain restrictions.

Now, the court below held that this clause was confined to small—scale local events and did not cover something as geographical disbursed, variegated and non—specific as the pandemic: judgment 405 {C/3/146}. If I had time, I would read to your Lordships paragraphs 404 to 407 and ask your Lordships to read them.

It is prima facie surprising that two identical radii in clauses both about restrictions imposed on premises by authorities on adjacent pages of the same contract should be held to serve such diametrically opposed purposes.

Eighthly, my Lords, the word "within" occurs before the one—mile stipulation on page 1560 {C/22/1560}. As your Lordships have been told before, "within" naturally denotes that the incident must be within the circle and not outside it, as in within these four walls or the premises will be supervised within the hours of daylight. But your Lordships don't have to take my word

for that, that is the meaning which the court gave the word "within" in Hiscox's NDDA clause.

If your Lordships look —— and again I have to ask your Lordships to do this —— your Lordships will see the submission at paragraph 399 {C/3/145} and the only way in which one can read the judgment, paragraphs 405 and 406 {C/3/146} is that that submission, namely that "within" could only mean within but not outside was accepted. Surely the preposition "within" should have the same meaning in both clauses.

The only answer to these points are in the, if I may say so, uncharacteristically weak paragraph 312 of my learned friends' respondents' case and they really stack up to no more than, "Well, if that's what you meant, why didn't you make it clearer?" Not a submission which your Lordships presumably are often troubled with. Cases that come to the Supreme Court, by definition, haven't made them clearer.

So those are the eight points I want to make, as it were, on construction but there are others. Why is the requirement for close proximity inserted? The obvious purpose, as others have submitted, is to ensure that only local events are covered.

If the cover is intended to respond in the event of a national pandemic, why have the parties stipulated for

a radius at all? What's it for? The court's construction has everything turn on whether a sufferer adventitiously happens to encroach within the circle. So the critical element of the cover constituted by the radius is reduced to an adjectival precondition before the assured can recover an indemnity for all the loss caused by the pandemic.

In a moment of candour, the Hiscox Action Group at paragraph 30 say, or concede —— I use that word; this may seem harsh. I suppose they mean harsh to a loser in the postcode lottery that the court has construed this clause as creating.

Well, they may say "harsh". Your Lordships may think "completely arbitrary" is a better description. If we look at the FCA's case, we'll look at this {B/10/390} —— the FCA's respondent's case 184 —— the FCA says, as if it were the law of the Medes and the Persians, in this paragraph, last two sentences:

"An epidemic is covered, but only if the premises are sufficiently close to it. A remote—only epidemic is not covered."

Now, what sense does that make? My learned friend Mr Edelman in paragraph 261 of his respondent's case deflects this problem in saying that the examples involving trawlers and aeroplanes are "fantastical".

They're not. My learned friend Mr Kealey alluded under a thin disguise, which I'm sure your Lordships penetrated, to the peregrinations of a notorious COVID—suffering Scottish Member of Parliament. For Hiscox 4 policyholders, the vast majority of whom by the way do not live anywhere near the Royal Courts of Justice, everything depends upon whether they happen to have a house near the London to Edinburgh line.

Now, we say —— and we have a finding in our favour on this —— the government measures in March were self—evidently not in any sense caused by an occurrence of disease within 1 mile of an insured's premises. If we look at judgment paragraph 418 at {C/3/149}, we can see that this finding is specifically made in respect of the Hiscox's NDDA clause even assuming that a person with COVID within the radius could be described as an incident, which the court has said it could not.

So the court here says:

"The position under the FCA alternative case is no better as regards causation. Even if the presence of a person with COVID—19 within the radius or in the vicinity could be said to be 'an incident' which it cannot, for the reasons we have given, it simply cannot be said that any such localised incident of the disease caused the imposition by the government of the

restrictions."

So where does one go from here? Well, the answer is this. Unless the occurrence in Hiscox 4 is construed broadly enough to include the whole pandemic, an occurrence within 1 mile means or includes the whole pandemic. It necessarily follows that the FCA cannot prove the recognised causal connection required between the stipulated occurrence and the restrictions imposed.

My Lords, I see the time. I have a little more on this point, but I don't think I can necessarily complete it in three minutes, although I probably could complete it in a few more than three minutes. I'm in your Lordships' hands.

LORD REED: Well, shall we adjourn, then, for five minutes and then we'll hear you further in five minutes' time.

MR GAISMAN: Thank you.

LORD REED: Thank you very much.

(11.42 am)

(A short break)

(11.50 am)

LORD REED: Yes, Mr Gaisman.

MR GAISMAN: My Lords, there is no appeal by the FCA in relation to paragraph 418 of the judgment, and so, as I say, unless the occurrence is construed broadly enough to include the entire pandemic, it necessarily follows

that the FCA cannot prove the required causal connection.

Now, we need to look at one paragraph of the judgment on this, paragraph 273 at {C/3/113} and we respectfully criticise the following aspects of this judgment.

First, in saying in line 3 that official responses would likely be to the full extent of an outbreak, the court was, with respect, begging the key question: whether a clause in the terms of Hiscox 4 was intended to respond to an outbreak beyond 1 mile.

My Lords, the only stipulated occurrence here is an occurrence of disease within 1 mile and that has to be a cause of the restrictions. In paragraph 272 as regards Hiscox 1 to 3, the court recognised that that requires a causal connection between the occurrence and the government measures or whatever it happens to be. However, in 273 it does not, as regards the stipulated occurrence, ie the local occurrence, "following" means only temporally posterior. That's the language used. This was because the court treated the local occurrence as part of the national outbreak. This is the court's part of an indivisible cause reasoning which Mr Salzedo and others have criticised.

For my part, I would only ask indivisible for what

purpose? Because, as Lord Hoffmann says, the proper formulation of a value judgment depends upon the purpose for which the judgment is being made. It's no good —— the FCA's respondent's case 356 —— saying that common sense dictates an inextricable linkage. Paragraph 356 feels the need to invoke common sense three times in eight lines, three times within eight lines in fact.

As Lord Hoffmann said in his Chancery Bar lecture, this appeal is a rhetorical device to divert attention from the absence of reasoning. But going back to Lord Hoffmann in his judicial capacity, you have to ask for what purpose am I asking the question? Now, here the contractual context is all—important and the question that the parties require to be answered is whether the stipulated occurrence has caused the restrictions imposed. Extrication of the stipulated occurrence from the pandemic to the limited extent necessary to answer that question is easy. The court did it in paragraph 418 {C/3/149}.

The answer is they found no causal connection. But the exercise is necessary under the contract for this reason, I'm sorry to fall back on quasi—algebra. Where the contract requires one to decide whether X caused A, you do not ask whether X is part of Y and whether Y caused A. That's the wrong question. So what's gone

wrong here is that the requirement of causation has been transferred to the national disease and the result is not only a very convoluted reading of a simple clause, but, if I may borrow back Mr Kealey's filching of a phrase in our mutual discussions, what is covered but not causative has been conflated with what is causative, but not covered.

Now, I've shown your Lordships the Hiscox NDDA clause and I've shown your Lordships the causation analysis. We do make the point that it is most peculiar for the causation analyses within these two similar clauses with the same limit nearly adjacent in the contract to have such radically different outcomes, and this must have happened, in our respectful submission, because, with respect, the court's approach has been influenced by hindsight.

Before February 2020, the parties will have been familiar with local authorities closing down premises because of rats or bad drains, and what has happened is that the court has squeezed in the unprecedented events of this year, despite the fact that there are clear indications in this clause that that is not what these parties objectively intended.

My Lords, that's all I want to say about Hiscox 4 and I want now to turn to grounds 1 to 4 of our appeal,

causation and the counterfactual under all the Hiscox clauses assuming that the cover is triggered.

I now assume that a complete peril exists and the question —— when we talk about causation here, we're talking about the relationship between the completed peril and the loss and it's in that context that the counterfactual questions arise.

My Lords, we don't need to spend any time on the principles. The court below unequivocally applied a "but for" analysis in Hiscox's case at judgment 278 {C/3/114} quite rightly. It's agreed that the question is not what the principles are, but how they should be applied. As my learned friend Mr Edelman says in paragraph 9 of his respondent's case, the question is not whether "but for" but "but for what"? Our answer is that the principles should be applied in the same way as in any other case.

The correct approach to the measure of indemnity under the PA clause in the Hiscox policies involves two enquiries. First, analysing the nature of the insured peril. Secondly, in the light of that analysis, constructing the correct counterfactual and comparing that with the situation which the insured is in and the difference is the measure of indemnity.

My Lords, the counterfactual is the mirror image of

the insured peril, and again we find ourselves in complete agreement with the Hiscox Action Group, footnote 15, who say that the role of the counterfactual is entirely dictated by the express terms of the policy.

It is the insured peril, as Mr Kealey submitted to your Lordships, that is reversed out in the counterfactual, no more, no less. The authority for that proposition is Orient–Express, judgment paragraphs 46 to 47 {E/31/930} and 51 to 52 {E/31/931} and while I'm on the Orient–Express, just two other points.

As my learned friend Mr Kealey showed your Lordships yesterday, there is no rule that one must reject a counterfactual if it is artificial. It is by definition a purely hypothetical construct. And again, Orient–Express clearly stands for that proposition, what could be more artificial than an undamaged hotel in a devastated city? Yet the court below expressly declined to accept our counterfactual on the grounds of artificiality, judgment 279 {C/3/115} thereby adopting precisely the argument that my Lord Lord Hamblen rejected in the Orient–Express at paragraphs 46 and 47 {E/31/930} of the judgment.

I should also mention –– sorry to be straying off topic –– that the Orient–Express directly contradicts

the FCA's argument made at some length that trends clauses are confined to purely extraneous events which have no connection with the insured peril. The paragraphs of the judgment in the Orient–Express 48 and 57 {E/31/930}.

So I turn then to the public authority clause and if we can have it on the screen again {C/6/401} and looking at this in more detail.

It's fundamental point, my Lords, that this clause does not insure against business interruption caused by vermin, disease, drains, et cetera. In the A–B–C–D taxonomy adopted in our appellant's case, which I hope your Lordships have in mind, it is not insurance against A causing D.

It's odd, then, that the Hiscox Action Group complains that our construction, impermissibly it says, is, "We will not cover you caused by X alone where X is rats, drains, disease". What's wrong with our saying that? We're back to the 13th chime point in the FCA's case, which, by the way, is repeated in their respondent's case at paragraph 454.

Now, the FCA, when it acknowledges that public authority restrictions imposed are an essential element of the peril, as we have seen, treats that element as purely adjectival. It's treated like the radius in the

disease clauses.

Well, my Lords, one is tempted to rebut that by saying: just read the clause. The FCA respondent's case at 388 and 389 seeks to justify this approach by saying that the underlying emergency will pre–date the public authority action and it must be contemplated that the former could cause loss of its own. Well, two points as to that.

First, as previously submitted, contemplation of an eventuality does not imply an intent to cover it. Secondly, this is where the FCA's confusion of Hiscox's clause with the express emergency clauses that, for example, Arch has is so unfortunate.

In the case of the Hiscox clause, there is no necessary emerging peril or emergency at all. The whole thing may occur at the same time with the baleful knock at the door of the restaurant by the environmental health officer on a routine visit.

In the typical case, it will be the public authority action which causes the loss.

Now, two features stand out in this public authority clause which is on your screens, I hope. We can take these two features quickly because they are common ground.

First, this is a composite peril consisting of

several elements which must all be present.

Secondly, mere presence of these elements is not enough. It is not a case of ticking all the boxes, as the Hiscox Action Group says, paragraph 15 of its appeal case. The elements are arranged in a particular causal combination. The FCA agrees with that. Now this two features have three consequences and this is where we part company.

First, until you have A causing B causing C causing D, the insured peril has not occurred. Now, the FCA agrees with that.

The second step is the crucial one. We submit that it follows from the first that only in respect of loss caused by the elements acting in that causal combination can there be a breach of contract, namely the insurers' failure to hold the insured harmless against that combination causing loss. That must follow from the premises so far, but this is where the FCA has to disagree or the game is up. But it's wrong.

Therefore, thirdly, for the purposes of the counterfactual, it is that causal combination and that loss alone which one reverses out.

Now, loss caused by A–X–C–D is not covered loss and it's not reversed out in the counterfactual. That is what happened in the Orient–Express. What was covered

there was damage to the hotel causing interruption causing loss. Let us call that B−C−D. Even if the court below were right that the hurricane in Orient−Express was somehow part of the peril, that gives us A−B−C−D. It still does not mean that loss sustained due to damage elsewhere in New Orleans is covered because that would be A−X−C−D. Likewise here loss caused by the consequences of COVID not amounting to restrictions imposed is not covered whatever that is.

The next point is this: although the insured peril is composite and has several elements, it is not axiomatic that each element has equal weight. Whether this is so or whether the clause has a predominating element is a matter of construction. It matters because identifying the core of the insured peril demonstrates the scope of the indemnity and the appropriate counterfactual.

If the public authority action is the centre of gravity of the clause, it must be fallacious for the FCA to say in its 13th chime point that the parties intended that the insured recover for losses that would have been incurred even without the public authority restrictions.

Now, the FCA in substance agrees that searching for the essence of the peril is the right sort of question. It just gives a different answer. As I said, it

originally called the clause a disease clause, which was pure question begging, but its case is −− and the references are in our appeal case paragraph 37 −− its case is that the essence of this clause is as an insurance against rats, drains, et cetera. That is what it calls the insured event. I'm quoting from its skeleton below, as I say I've given your Lordships the reference. They say that the purpose of that condition −− sorry, that's the insured event. They say the public authority action is simply a condition that has to be fulfilled to trigger cover, the cover being cover for rats and drains. And they say the purpose of that condition, it's in the same paragraph, is to ensure (1) that covered is only triggered by a serious case of rats and, secondly, to enable the insured to prove its claim.

Now, my Lords, we say this is not difficult. This is not a case of insurance against rats provided only that there's public authority action. It's an insurance against the stated consequences of public authority action provided that the reason is one of the things enumerated in clauses (a) to (e).

Now, we deal with this in our appellant case paragraph 34, which I have to take as read, but one can test the matter in this way. If we can go back to the

clause itself, what's the reference? {C/6/401}, thank you.

One can test the matter in this way. These sub−clauses (a) to (e) make clear that not all restrictions imposed by public authorities will trigger cover but only those imposed for the reasons identified. If those sub−clauses were not present, there could be no doubt that the maximum ambit of the indemnity was for the consequences of restrictions imposed. But (a) to (e) qualify the public authority action which is within the cover. They circumscribe the insured peril making clear that it only responds to a subset of all possible causes of restrictions imposed.

The presence of these limitations, therefore, cannot have the effect of expanding the peril or changing its character and since disease is not a peril in its own right, but, rather, its presence in the clause identifies the type of restrictions imposed, it cannot be right in principle to require Hiscox to indemnify the insureds for all losses flowing from it as if it was the independent peril which it isn't. So the FCA's construction turns the clause on its head in the way and for the reasons I have indicated.

Now, what happened below? The first thing that happened in the court below, my Lords, is that we made

these submissions and the court did not address them, and we would respectfully submit that that was the court's first mistake.

And it led to its second, which was to analyse the peril as one which merely required the presence of the constituent elements, rather than loss flowing from their causal combination. That error is explicit in the penultimate sentence of judgment paragraph 278 {C/3/114}, where one has a few lines up:

"What the insured is covering itself against is, we consider, the fortuity of being in a situation in which all those elements are present."

So, in other words, in our probably rather tiresome illustrations, the court treated it as a case of adjacent tiles rather than superimposed tiles. Both of those errors, my Lords, led to the third error which is the supposition that the clause requires the stripping out of the outbreak of COVID, or the epidemic of COVID in, its entirety. That cannot be right for reasons I've already indicated, because COVID is not the insured peril and Hiscox is not in breach of contract as regards the consequences of COVID but only, to simplify the peril for the sake of clarity, in respect of loss caused by public authority restrictions consequent upon COVID. We never promised to hold the insureds harmless

for all loss flowing from the first element in the causal chain, so how can that be the measure of damages for our breach of contract?

In other words, the public authority restrictions are like the damage requirement to the hotel in the Orient—Express. They act as a filter, which makes clear that it is not necessarily all the loss flowing from the underlying cause which is covered but only some of it. How much will depend on the facts.

The court's fourth error, my Lords, was to think that our analysis wrongly leaves the disease in the counterfactual and therefore fails to recognise that the disease is an essential element. That was the court's reasoning at 279 {C/3/115} but we recognise that the disease is a necessary element, but it is not the predominating element, as I have indicated —— my learned friend and I disagree about that —— and we do strip it out of the counterfactual but only to the extent that it causes restrictions imposed.

Now, I'll come back, time permitting, but I think it should permit, to the games which the FCA plays with this submission in paragraphs 431 to 433 of its respondent's case but I'll do that in a minute, if I may.

The fifth error of the court below was to move away

from contractual construction to supposed problems of proof —— and I need to spend a little time on this —— which were said to arise on Hiscox's construction because that's what the court did in paragraphs 280 to 282 {C/3/115}. Now this is actually rather a bold thing to do.

To fashion a counterfactual which is not the mirror image of the insured peril, which it should be, because otherwise the cover is "illusory" from the insured point of view. What was the evidence that that was so on Hiscox's construction? My Lords, there was none. There is none. It's just the FCA's say—so.

Moreover, as far as the court was concerned, on an extreme and doubly contrived example of a restaurant, the sort of business with, by the way, 95% of Hiscox's policyholders have nothing to do with, a restaurant, one, overrun by rats; two, through no fault of the owner, your Lordships may remember they migrated from a nearby building site; and three, which is first voluntarily closed and then compulsorily closed, a special feature of my learned friend's example deliberately included in order to obscure an otherwise apparent trend. Now, let me spend a little more time on these supposed difficulties of loss.

What the court has done without any evidence or

concrete foundation to ascribe to the parties a distinct prospective intention to abdicate any attempt to work out what loss was caused by the actual insured peril and what loss would have incurred anyway on the basis that they must have assumed in advance that the problem of quantification of loss would be so difficult in a business interruption insurance of all things that the normal rules governing the measure of indemnity should be discarded. There is no basis for this.

My learned friend for the Financial Conduct Authority asserts without any grounding that proof of the losses caused by the public authority restrictions is impossible. It's a word he uses many times: for example, respondent's case 459. Not only is that not evidence, it's wrong. Now, this is important.

Could we look at it, please, in the FCA's respondent's case 450 {B/10/475}. The account of how loss adjusting would take place in the present circumstances is one that Hiscox simply does not recognise. It bears no relation to reality and I will demonstrate this with a simple case.

A restaurant is ordered to close on 21 March. It reopens on the first available day in early July. The FCA's question is: how can you tell what part of the

loss during the lockdown is due to public authority closure and how much to the other effects of COVID, assuming no closure? You can't, it says. So the restaurateur should have 100% of his loss. The court agreed.

Now, the obvious metric that the loss adjuster in that example would no doubt propose is this: look at its performance before it was made to close. Look at its performance after it was allowed to reopen. What is the problem with treating those numbers as a good approximation of the loss caused by COVID as opposed to the loss caused by the enforced closure?

Now, we are not after perfection here, my Lords. The trends clauses in the Hiscox policies and many others just say that the ascertainment of the position has to be "as near as possible" to the position had the peril not occurred. There's no difficulty here, my Lords. May I tell your Lordships what the difficulty is? The difficulty is in understanding how the FCA can say that a business whose turnover went down to 30% of normal in March and was 25% of normal when it was allowed to reopen in July, can claim 100% of its normal turnover in between the two on the grounds of some supposed impossibility of extricating the effect of closure and the effect of COVID at large?

My Lords, that is the complete answer to this whole area of the FCA's case and no doubt we will hear from my learned friend his explanation for why it is that he is apparently seriously told your Lordships that his estimate is that the claimants' loss adjuster or the claimants' expert would have to produce a 2,000—page report to prove loss. That's paragraph 454. He'll no doubt explain why, the sort of approach I have outlined, which is —— well, there's no evidence on this case, my Lords, on either side.

So there are two answers to this paragraph 450 point. First, stripping out all the effects of COVID after the peril is triggered will clearly over—indemnify the insured and, secondly, the supposed inextricability does not exist.

Then, my Lord, my learned friend, on a bit of a roll at paragraph 45, invites the supposition that each small or medium—sized enterprise insured with a low limit will have to retain its own loss adjuster and presumably its own expert producing that 2,000—page report. That is also unrealistic. All the Hiscox policies in this case contain arbitration clauses and I can tell your Lordships, because the Hiscox Action Group have chosen to put this into the public domain in a press release, the fact that Hiscox has agreed to consolidate

the members of the action group's 384 individual claims before a single panel of three arbitrators reviewing four categories of policy.

It's also the case, of course, that the Financial Ombudsman Service will also no doubt hear claims and he or she, whoever it is, has a jurisdiction to take a rough—and—ready approach based on —— and I'm quoting from FSMA section 228 —— what is "fair and reasonable in all the circumstances of the case."

And no doubt with low aggregate limits, that's exactly what everybody would expect.

So in the circumstances of this pandemic, taking my learned friend's favourite example of a restaurant, where's the difficulty? Where's the insuperable difficulty? Where is the difficulty that is so great that the parties have torn up the rulebook when it comes to constructing the counterfactual?

Now, what then happened below —— and luckily I haven't got time to go into this a great deal —— is that the parties traded —— your Lordships will have seen this from the case —— cases involving food poisoning and cases involving rats, and something rather unkind is said about our food poisoning example. I must rise I think to this fly at least. It's paragraph 392.3 of my learned friend's case where he says that my example

of somebody who is food poisoned and complains to the authorities who close down the restaurants, Where is the problem with loss being caused by the closing down?

That example is criticised on the basis that I have dodged, that's my learned friend's word, rather unkind, dodged the case of the customer complaining to the restaurant. No, I haven't. Let the customer complain to the restaurant. Let the owner of the restaurant report himself to the local authority. He's hardly likely to close himself down voluntarily when one person has complained of food poisoning in his restaurant. But let the authority close him down. That has to happen. Even on my learned friend Mr Edelman's case, all the loss of trade will typically be any caused by the closure, and if a disgruntled has gone on social media a week before the closure to publicise the episode, any resulting downturn may be brought into the calculation which is exactly consistent with the part of the judgment that my learned friend Mr Edelman does not like, namely the conclusion that the court reached in relation to the pre—trigger downturn where it held that it was legitimate to take into account the depressive effect of the gathering storm or in this case Twitter storm.

There is nothing wrong, my Lord, of Hiscox citing

an example where the underlying cause would not have affected the business such as legionnaires' disease or a suicide or a local measles outbreak. My learned friend recognises that in these cases there would be no difficulty in the insured proving his loss, so what he says is that these are "outlying cases". That's paragraph 393 {C/3/143}. Well, my Lords, I'm sorry but who says? This is pure assertion, as so much of this section of my learned friend Mr Edelman's case is.

Then we get the rat example which apparently impressed the court. If we can get away from contrivances involving building sites. There are two possibilities here: either the rats or the cockroaches or the mice are in the kitchen and customers don't know about it. Well, the occult rat problem will lead in casu to closure by the public authorities. No problem in the insured proving his loss. Or, it's the alternative, the rat problem is known to customers, amazingly the rats are in the public areas of the restaurant.

In this case, it's not unreasonable to suppose that the natural human antipathy to rats will depress turnover before the public authority closure and that decline would provide an approximation of the effect of rats without public authority closure, thereby enabling

the insured to prove the additional effect of the public authority action.

My Lords, if I had time I would say other things about my learned friend's examples, but just, as it were, summarising here and then I've got maybe one or two further areas I just need to deal with, the court was over−impressed by the supposed difficulties of proof which were an important part of its reasoning in paragraph 281. My learned friend, encouraged by that, keeps saying that modelling and proof remain impossible, but there's no evidence of it.

Of course, he helpfully also reminds us that Lord Mance in his book on insurance disputes says that intangibles and hypotheticals are the very stuff of business interruption insurance. He cites that in his appellant's case, paragraph 6 and there's no getting away from that.

The last point here perhaps −− almost the last point −− is that this all presupposes that the burden is on the insured, that's expressly assumed in judgment paragraph 281, despite the fact that we expressly recognised below that although it will depend on the facts, once the elements of the clause have found to be proven and loss has prima facie been shown to result, the evidential burden may in a given case shift to the

insurer to prove that the loss would have occurred anyway. My learned friend, paragraph 459 of his respondent's case contains no answer.

Fortunately, I have no time to waste on The Silver Cloud, a decision which the court below rightly regarded as a case on its own facts and really the exercise of crowbarring the finding of inextricability on the facts of that case into the facts of this one goes well beyond the legitimate use of authority.

My Lords, all I need to do now is just deal with my learned friend's, as it were, teasing points on our counterfactual in paragraphs 431 to 433.

Shorn of rhetoric, he raises two questions. First, what does Hiscox mean by taking out "disease" insofar as it causes restrictions imposed; and, secondly, which restrictions imposed are taken out for the purposes of the counterfactual? I will deal with the first point first.

In the PA clause the restrictions must follow, ie be caused by in some sense, the disease and then the restrictions must cause inability.

So as far as the insured peril is concerned, it is the causal effect of the disease which is covered and nothing else. That causal effect is the function of the

disease and the clause, restrictions not caused by (a) to (a) are not covered. The disease, therefore, needs to be removed insofar as it causes the restrictions imposed. That's not the same as removing the whole pandemic, whatever paragraph 433.3 says. And if my learned friend reminds himself of paragraph 421, he will see that in relation to Arch he recognises that that's not the effect of the argument.

Equally, and more importantly perhaps, contrary to 433.1, this does not involve working out what lower level of disease must have been just sufficient to cause relevant restrictions. Nothing as complicated as that. With great respect, my learned friend is making complications which don't exist. It arises because my learned friend misunderstands our use of the expression "insofar as" and implies that we're using the expression quantitatively when we are using it causatively.

A similar point is in 433.5.

Lastly, my Lords, restrictions. What restrictions are stripped out of the counterfactual?

The restrictions imposed, which are relevant to the insured, are those which produce an inability to use the insured's premises. Any other restrictions imposed are irrelevant to the insured peril.

Taking the 26 March regulations, regulations 4 and 5

are capable of being restrictions imposed.

Now, the example of something called a nail salon, which was ordered to close by regulation 4 and schedule 2, part 2. For a nail salon, the relevant restrictions is regulation 4. It's not the whole of the regulations. It's not the other regulations. They are not a restriction imposed relevant to the nail bar. Regulation 4 applies to all nail bars. Unlike the usual case of rats or drains, this is not a case of a restriction aimed at a single premises the restriction applies to all premises of a certain type.

So that restriction, which gives rise to an inability to use the insured's premises is the one that is removed for the counterfactual. That means you don't remove the entire regulations, contrary to FCA 432 and 433.4. You don't assume in the counterfactual that the insured's nail bar is the only nail bar open, because the restriction applies to all nail bars, contra FCA 432.2. Therefore, in the counterfactual all nail bars are open and there is no question of windfall profits. Contra FCA 433.3.

Now, in this part of the case the FCA seeks to set up hard questions for the loss adjuster, but it is simply a question of the court or tribunal deciding what as a matter of construction is the relevant restriction

imposed? The possibility of argument about what the relevant restriction imposed is is a legal argument that does not help the FCA's case. In any case such as this one, there can be debate about the ambit as a matter of law of the insured peril.

Accordingly, the possibility of debate over the ambit of the insured peril exposes no conceptual flaw in our analysis. If there is a dispute in any given case, the legal tribunal will decide what are the relevant restrictions imposed and the loss adjuster will then deal with the consequences.

My Lords, those are my submissions, unless I can help your Lordships any further.

LORD REED: Thank you very much, Mr Gaisman.

We now turn to one of the counsel on behalf of the insurers, Mr Lockey QC for Arch Insurance.

Mr Lockey.

Submissions by MR LOCKEY

MR LOCKEY: My Lords, good morning. Arch's appeal raises issues of causation at the stage of the quantification of loss where a prevention of access business interruption extension has been triggered. In the taxonomy used in this litigation, Arch is not a disease clause insurer, nor a hybrid clause insurer, it's a prevention of access insurer.

The relevant Arch policy contains a number of non-damage business interruption extensions, only one of which is relevant for these proceedings: the government and local authority action clause, or GLAA, extension vii which your Lordships will find at {C/4/226} starting at page 226.

At 226 on the right-hand side you'll see under the heading "Clauses", you'll see the stem language which refers to and introduces the individual non-damage business interruption extensions, and you will note the language used "resulting from" at the end of the introductory words before clause 1 "Prevention of access". We can ignore 1 and 2 and we can skip over 3, the disease clause.

Extension 3 does not apply in the present case because there was a closed list of notifiable diseases in the Arch policy which did not include COVID-19. So we can ignore clause 3 for present purposes, although its terms may be of relevance on the FCA's appeal on ground 3 and we can look at that in due course if we have to.

So if we turn the page to 227, your Lordships will find at 7 {C/4/227} the relevant clause, the government and local authority action clause, and obviously the focus is upon the first three lines. It is clear, we

would respectfully suggest, from its terms that it's not every prevention of access to the premises which will trigger this extension. To qualify, there must be a prevention of access to the premises which is the result of government or local authority action or advice, which in turn is the result of an emergency of the requisite type and the required sequence is set out in the clause itself.

If my Lords turn back to pages 224 and 225 in C, tab 4 {C/4/224}, {C/4/225}, the policy contains provisions for the calculation of the indemnity for business interruption losses and it's common ground that these apply to the non-damage extensions as well as to the standard business interruption cover which applies where there has been damage to property with the word "Damage", with a capital D, replaced throughout with the language of the relevant insured peril under the non-damage business interruption extensions. We explain these provisions in our written case at paragraphs 13 to 25 and I don't have time to develop those points orally.

The key provisions are the indemnity in respect of the loss of gross profit, which you will see on 225 at the top of the right-hand column {C/4/225}.

The amount payable will be:

"in respect of reduction in turnover the sum

produced by applying the Rate of Gross Profit to the amount by which, due to the Damage, the Standard Turnover exceeds the Turnover during the Indemnity Period."

Then, if one turns back to {C/4/224}, at the foot of 224 in the right-hand column, we have the Arch trends language, the trends clause under the definition of "Standard Turnover", and I just ask you to note the terms of the Arch trends clause there set out and it continues at the top of 225 {C/4/225} in the left-hand corner, closing with the words:

"The adjusted figures will represent, as near as possible, the results which would have been achieved during the same period had the Damage not occurred."

Now, my Lords, Arch's position as to when and in what circumstances the GLAA clause was triggered was accepted by the court at paragraphs 309 to 336 {C/3/122} of the judgment. I'm not going to ask you to look at that. You will no doubt read and reread that in due course.

That position is reflected in the order made following the trial. I'm not sure that anyone has actually referred your Lordships specifically to this document. Obviously, it forms the heart of the appeal, the declarations which were made following the trial,

and it's {C/1/8} and if you look at pages 8 and 9, at paragraph 14.4 and 14.5, you will see, so far as the trigger of coverage under the Arch policy is concerned, that the position was set out in paragraphs 14.4 and 14.5 essentially as Arch had argued in the court below.

In short, and summarising what is set out in 14.4 and 14.5, and more generally in paragraphs 309 to 336 {C/3/122} of the judgment, the court held that there was a qualifying prevention of access to the premises only for those businesses who were advised or required to close their premises by the government in late March 2020 as a response to the pandemic, the emergency for the purposes of the GLAA clause.

That was the position which Arch had already taken in its dealings with its policyholders. Arch has accepted throughout that for certain classes of business, the GLAA extension has been triggered and the issue has been one of quantification, and Arch's appeal raises an issue of causation or issues of causation in that context where the policy has been triggered.

Now, my Lords, in those paragraphs of the judgment which deal with policy trigger, the court held correctly that the pandemic, the emergency in the GLAA extension was not the insured peril. That's paragraph 309.

And at paragraphs 328 and 329 {C/3/127} of the

judgment, the court also held, again we say correctly, that the social distancing advice and regulation 6 of the 26 March 2020 regulations, the direction that people were to stay at home unless they had a reasonable excuse for leaving, those regulations and that advice did not prevent access to insured premises for the purposes of the GLAA extension, and that conclusion is reflected in paragraph 14.5(b) of the declarations.

So the key issue on Arch's appeal is whether, in adjusting claims where there has been a relevant prevention of access, Arch can seek to remove loss which the business would have suffered in any event by reason of the emergency and its economic consequences, even if the premises had not been required to close. And the court below ruled this out as a matter of law and it is this which our appeal challenges.

The FCA's written case on its appeal acknowledges at paragraph 7.1 and the reference is {B/2/30} that many businesses may have suffered a reduction in turnover because of the emergency during the period after the policy was triggered, even if there had been no closure advice or requirement and we would say that in those circumstances it follows that it was not the prevention of access which caused that particular reduction in turnover.

But the court's judgment means that that reduction in turnover is recoverable and we respectfully submit that something has obviously gone wrong with the court's analysis, and that is because the GLAA clause clearly does not provide an indemnity for those losses which a business would have suffered even without the prevention of access.

Now, my Lords, we of course all have sympathy for those running businesses, particularly small and medium−sized businesses, which have been severely impacted by the effects of COVID−19. But an expansionist approach to the construction of insurance clauses and to causation is not, we would submit, an appropriate or principled solution, nor is it one which is likely to be satisfactory in the long run. Ultimately, the question of what cover has been granted is dictated by the terms of the policy and not by reference to what may or may not have been reasonably foreseeable.

My Lords, the FCA makes the point in its written case that the GLAA extension contemplates the existence of an emergency which could have many effects for a business beyond prompting government action which causes the prevention of access to the premises. And that may well be right, but that does not mean that one

should read the policy as if it said that all the effects of the emergency will be insured if access to the premises is prevented by government action taken in response to the emergency.

We would respectfully submit that the policy clearly provides that it's the economic effects on the business of the prevention of access to the premises which are covered, not the economic effects on the business of the emergency in the round.

The effect of the court's judgment −− and I will show you the relevant declarations in moment −− is that Arch is prevented from seeking to adjust claims on the basis that some or all of its policyholders would not have realised all or some of their expected gross profit even if the premises had not been closed, and that those businesses would have suffered a loss of gross profit in any event even if they had remained open because of the economic effects of the pandemic, including the reductions in footfall caused by regulation 6, the instruction to stay at home, and the social distancing guidelines, and other matters such as the general lack of consumer confidence and the economic recession brought about by the pandemic, none of which are insured perils. If you've still got the declarations order open, my Lords, can I just direct your attention

to the particular declarations of concern in this context. Declaration 11.1 and 11.2 {C/1/6} and in particular 11.2(b) for the Arch clause. These declarations prevent Arch ——

LORD REED: I'm sorry, could you remind us of the bundle and page number?

MR LOCKEY: I am sorry, my Lord.

LORD REED: Not at all.

MR LOCKEY: It's {C/1/6}.

LORD REED: Thank you very much.

MR LOCKEY: Declarations 11.1 and 11.2(b). And, my Lords, those declarations prevent Arch from arguing by reference to the turnover in fact achieved by a relevant insured business in the months following the reopening of their premises when the business continued to be affected by the emergency and its economic consequences that the gross profit during the profit of closure would have been lower than the gross profit achieved over the same period in 2019, even if the premises had remained open, because of the wider effects of the emergency. And declarations 11.1 and 11.2(b) also rule out as a matter of law Arch's ability to point to evidence that businesses which were not required to close their premises from late March until early July 2020 suffered a reduction in turnover compared to the same period in

2019 because of the economic effects of the pandemic and the reduction in consumer footfall as a result of the emergency or the stay—at—home advice and regulation 6.

We managed to salvage something on causation below in declaration 11.4(c), which is the subject of ground 1 of the FCA's appeal: the pre—insured peril downturn point. But declaration 11.4(d), qualifying 11.4(c), precludes Arch from arguing or showing that a pre—peril downward trend in turnover due to the emergency would have accelerated during April, May and June 2020 even if the premises had not been required to close.

So, my Lords, one asks, perhaps rhetorically: how did the court fall into error? And, in our respectful submission, it is an error in construing the GLAA clause. The court's judgment on the quantification issue starts at paragraph 337 in {C/3/129}. And the court's main conclusions, insofar as Arch is concerned, are at paragraphs 345 through to 348.

Now, my Lords, the court did not set out the policy provisions for the calculation of an indemnity, and they proceeded instead —— as you will see from 337, the court proceeded straight from dealing with which policies were triggered for which categories of business to the trends provision. They proceeded straight from examining the question of coverage to an analysis of the trends

clause, and the court appears, at least in this part of the judgment, to have concluded that the requirement for "but for" causation —— and, as I said, we're here concerned with quantification and not with whether the peril has operated, we're here concerned with the quantification —— the court appears to have concluded that the requirement for "but for" causation arose because of the trends clause and not otherwise.

Now, my Lords, I accept that the point may be academic, because we do have a trends clause, but we do submit that the court below was in error if, as appears to be the case, it assumed that the requirement for "but for" causation only arose because of the presence of the trends clause. And we would submit that even in the absence of a trends clause, a policyholder whose premises have been closed because of government action is not entitled to claim a loss of gross profit which the policyholder would not have made if the premises had remained open.

But be that as it may, the trends clause is present in the Arch policy and the FCA accepted, and the court found, that it mandates the application of a "but for" test of causation at the quantification stage.

At paragraph 347 of the judgment {C/3/132} the court

held that the comparison required was with the hypothetical performance of the business as if there had been no emergency and thus no government actions or advice, including the social distancing advice and regulation 6, and that, in those circumstances, the rather —— that Arch's case should be rejected.

Arch's case in summary was, and it remains, that the appropriate counterfactual involves assuming that the insured peril did not operate. And the assumption is therefore that the premises remained open and that the relevant part of the regulation requiring that category of business to close its premises is assumed not to have been made.

By the court's application of what it regarded as the "but for" the insured peril test, what the court below has done has in fact treated the emergency as being an insured peril once the GLAA clause has been triggered, and that, we would respectfully suggest, is just wrong.

The effect of the court's conclusion is to widen the indemnity in the GLAA clause from one which covers the consequences for the business of the access to the premises having been prevented to one which covers all the consequences for the business of the emergency during the period when the premises are required to be

closed, and we say that that involves a substantial and impermissible rewriting of the GLAA clause. And we submit it's simply not possible to read the GLAA extension in the way in which the court read it. The court below appears to have concluded that each of the steps in the chain of causation set out in the GLAA clause takes effect as individual insured perils once the causal sequence is in place and the insured peril has operated. But that's simply not what the clause says.

Labelling the clause as a composite peril, as the court did, does not improve the analysis. That label has no fixed legal consequences. And, more generally, as a matter of general principle there is no principle of insurance law or of contract law damages that requires the "but for" counterfactual to assume not just the non−operation of the insured peril or the breach of contract, but also the absence of everything in the causal chain which leads to it. And the court does appear to have thought that there was a general principle to this effect at least in insurance law, and I say this because of the court's reference to the insured peril in the Orient−Express and the court's opinion that the cause of the damage in that case was, to quote, at paragraph 526 of the judgment {C/3/177} −−

perhaps I can ask you to look at that −− that the cause of the damage in that case was an integral part of the insured peril. The last sentence of 526 and then 527:

"On the basis that the hurricanes were an integral part of the insured peril, we consider that when it came to the construction of the trends clause, the judge should have concluded that the words: 'had the Damage not occurred' meant that the counterfactual was one where both the damage to the hotel and the hurricanes and their effect generally were to be stripped out."

Well, we would respectfully submit that there is no principled basis for arriving at that conclusion, that the cause of the operation of an insured peril is to be stripped out as part of the counterfactual.

So far as the Arch policy is concerned, if one turns back to 346 and 347 in the judgment {C/3/131}, the court thought that the manipulated trends clause compelled the assumption that there was no emergency. And you will see this at paragraphs 346 and 347 of the judgment.

At 346, the court set out −− we've seen on (inaudible) the policy itself at {C/4/224} −− the trends clause manipulated so as to incorporate, in place of the words "the Damage", "the insured peril under the GLAA clause". And we have no beef with the exercise of manipulation which is there engaged in. But what the

court concludes in paragraph 347 is that it follows that upon the true construction of the Arch policy wording the comparison requires the removal of everything, including the emergency. But, with respect, it plainly does not follow. The unmanipulated trends clause in the ordinary case of accidental damage does not require an assumption that whatever has caused the damage to occur did not occur. And the position in this respect is identical, I would respectfully submit, to the analysis in the Orient−Express case, and in particular at paragraph 46.

The language of the manipulated trends clause likewise does not lead to the conclusion which the court reaches at 347. If one asks on the language of the manipulated trends clause: but what is it that one assumes did not occur? It is simply the qualifying prevention of access. The plain language of the manipulated trends clause simply does not call for an assumption that the emergency has not occurred.

Now, although the court does not say so in terms, the court does appear to have accepted that the trends clause only applies to matters which are unconnected to the insured peril. But no such limitations can be read into the Arch trends clause or indeed any of the other trends clauses in this case. The Arch trends clause

refers to any trends or circumstances, and the word "any" is hardly a promising start for a submission that there are limits on what may be a trend or circumstance. And we would respectfully point out that there's nothing in the language of the trends clause which says that something which is not an insured risk but which is part of the causal chain which leads to the operation of the insured peril cannot constitute a relevant trend or circumstance when it continues to have separate causal effect after the insured peril has operated. In other words, separate from its effect as part of the causal chain leading to the operation of the insured peril.

Now, we have been treated −− I use the word advisedly −− to an examination of the textbooks on business interruption insurance by the FCA, but there's nothing −− when one looks at those extracts, there's nothing in those books which suggests that there is some rule that a trend or circumstance must be unconnected with whatever it is that has caused the peril. When the books refer to trends or circumstances as being something which is extraneous to the insured peril, the authors are making the obvious point that the insured peril is not itself a relevant trend or circumstance, and the authors are simply not addressing the issue which arises in the present case.

My Lords, finally, a word or two on inextricability and practicality. Can I invite your Lordships' attention to paragraph 348 in the judgment below {C/3/132}.

My Lords, the court was of the view that its conclusion on the counterfactual accorded with commercial and practical reality, and that there was an inextricable link between the various elements of the insured peril.

Now, my Lords, it's not clear what the court meant by " inextricability " in 348. The peril, the prevention of access by reason of a government order to close in response to the emergency, is obviously related to the emergency which prompts the government order. But the emergency had economic effects and, indeed, continues to have economic effects quite apart from the government action or advice which required closure of the premises in March 2020.

We know, from the assumed facts, that some businesses were suffering losses caused by the emergency before the closure orders. We know that the emergency continued to have adverse economic effects for many of the businesses which remained open and which were permitted to remain open between April and July 2020. And we know that premises that were required to close

were permitted to reopen generally from 4 July 2020, but the emergency and its economic effects continued beyond the date when they were permitted to reopen and, indeed, continue to this day. And these points clearly demonstrate that there is no inextricability between the emergency and the prevention of access.

Separating out losses from the closure —— separating out losses caused by the closure from the other effects of the virus which are uninsured is a matter of adjustment and, as Mr Gaisman reminded you, adjustment exercises are often far from straightforward whenever one is seeking to establish trading results.

As the Orient—Express award recorded, all claims for business interruption raise hypothetical issues, and whilst the tribunal would acknowledge that the evaluation required on the facts of the present dispute is more difficult than most, this cannot affect what is the current approach in principle.

And, my Lords, there was certainly no accounting or adjusting evidence before the court which would support a finding of impracticality, and the declarations which rule out attempts to adjust the loss in accordance with what we say is the true position under the contract are simply wrong as a matter of law.

My Lords, I have reached the conclusion of all that

I propose to say orally. I obviously adopt what's set out in our written case. Unless your Lordships have any questions for me, that is all I propose to say.

LORD REED: Well, thank you very much, Mr Lockey.

At this stage in the appeal we turn to the response on behalf of the Financial Conduct Authority, whose counsel making the submissions will be Mr Edelman QC.

Mr Edelman, it scarcely seems worthwhile inviting you to begin now, so we'll adjourn just now, but clearly we'll take account of the fact that you're starting a quarter of an hour later than had been scheduled.

So we'll adjourn for just now and resume at 2 o'clock.

(12.59 pm)

(The luncheon adjournment)

(2.00 pm)

Submissions by MR EDELMAN

LORD REED: So we turn now to the submissions on behalf of the Financial Conduct Authority and Mr Edelman QC.

Mr Edelman.

MR EDELMAN: I am grateful, my Lord. I'm assuming also that Lord Briggs is not at this stage appearing on video, and so I will invite him to interrupt me as and when he wishes for any questions he wants to ask.

My Lords, can I just start with a short foray in the

background, since Lord Briggs is now here on video, and can I start with the statutory background and the public health (inaudible) bundle G, tab thirty (inaudible), perhaps remembering what this actually says, because this tells us something about the nature of the disease risk. It is difficult for me. Of course if we were in court I'd know you had it before you.

Section 13(1) provides that the Secretary of State can make regulations under:

"(a) with a view to the treatment of persons affected with any epidemic, endemic or infectious disease and for preventing the spread of such diseases."

LORD REED: I'm sorry, Mr Edelman, can you just remind me where you've taken us? I'm afraid I lost a few words that you were saying.

MR EDELMAN: My Lord, it's {G/36/245}.

LORD REED: Thank you very much.

MR EDELMAN: And it's section 13 of the 1984 Act.

LORD REED: Yes, thank you.

MR EDELMAN: That's the source of the regulation—making powers which applies to epidemic or endemic or infectious diseases and it's to prevent —— for their treatment and to prevent their spread. While we're in the bundle, it's perhaps worth turning forward to page 251 {G/36/251} which are the sections which were

added in 2010, with effect from 2010, to regulate international travel at 45B. At 45C: "Health protection regulations: Domestic" in sub−paragraphs 3 "Regulations under subsection (1) may... include in particular provision ..."

And if we go to page 252 {G/36/252} we can see:

"Imposing or enabling the imposition of restrictions or requirements on or in relation to persons, things or premises in the event of, or in response to, a threat to public health."

And those can also include special restrictions

So that is the statutory background to this. Now, if I turn to the history of the development of the disease, and for that purpose if we could please go to bundle {C/48/1988}. So it is bundle C, tab 48, page 1988. There was another copy of this in our submissions.

This is the map, if you have it, which shows how the reported cases −− and I emphasise this is just reported cases −− how those spread across the country during the course of March. And it is a critical document in understanding what this pandemic was all about because we all hear about it, but this is the spread of reported cases across the United Kingdom starting on 2 March, the first map. Then 9 March, the second. Then 16 March,

when the government −− the Prime Minister made his first announcement −− and then 23 March and you can see there's only north Devon by then is the only place without a reported case.

You can obviously also see that certain parts of the country were hit more comprehensively first, but this was a national epidemic and this would have been the picture that the government and its scientists were seeing. And that, we submit, of itself demonstrates that there was one indivisible national epidemic, as the court rightly found, and if you divide up the outbreak into just reported cases, it's quite apparent that each case has made its own equal or roughly equal contribution to the overall picture.

But, of course, behind the reported cases, particularly at that early stage of the disease, was a swathe of unreported cases. Now, the parties couldn't agree that the models that the government had relied on were reliable, as insurers wanted to check their reliability, so I don't rely on these as to the actual level of under−reporting because insurers wanted to contend that the actual level was or might be lower, but what the parties did agree is reported in this same bundle at page 1929 {C/48/1929} and it's at paragraph 41. This is the language the parties were

able to agree:

"The actual presence of COVID−19 in the UK in March 2020 would have been much higher than was reflected by the number of Reported Cases. However, the extent of the difference between the number of Reported Cases and the actual number of people infected with COVID−19 is not agreed."

But just so that you can see what the estimates actually were, if we go to the next page {C/48/1930} this just gives you a sense of the order of magnitude, I'm not relying on these as accurate figures, but just as a sort of ballpark as to where the government scientists were putting this.

At paragraph 44:

"Imperial College report estimated that 2.7% of the United Kingdom's population had been infected with COVID−19 as at 28 March 2020."

In paragraph 45:

"Applying the 2.7% infection rate estimated by the Imperial College Report (the correctness, accuracy and reliability which is not agreed) to the UK population of 66 million−odd, the number of people infected would be [a fraction under 1.8 million]."

Then if we go to the Cambridge analysis, which is referred to in paragraph 47 and one useful illustration

is on the next page at 1931 {C/48/1931}, which is having a look at the east of England.

You can see they did projections as to the curve of the development of the pandemic and they had a lower median and upper range, you can seen on the graph, and the median range was that, at 21 March 2020 in the east of England region, that's essentially the East Anglia area and around there, 89,000 cases.

As I emphasise, though, the precise numbers are not critical for this appeal but they demonstrate, we submit, the obvious and agreed fact that it was not just reported cases but what the spread of reported cases was telling you about the level of infection in the country that was material. Some point below was made about the fact that the infections −− a lot of the reported cases were in care homes and of course overlooking the fact that the infection had to get into the care homes. Somebody brought it in and it would be those working or visiting −− working in or visiting a care home.

So unsurprisingly, with what has proved to be a highly contagious disease, on top of the reported cases based on the limited testing being done in March 2020 and the death data was a known unknown, if you'll excuse that phrase, of very substantial numbers of people who had become infected and who had infected

or were capable of infecting others.

This is reflected in the minutes of the Scientific Advisory Group for Emergencies, SAGE, and we can stick with C bundle, if you've got that PDF or file still open, and that is at {C/27/1773}. I just want to show you some very brief passages there.

If we start with this at {C/27/1773} is 13 March. If we just go to the middle of the page, the situation update. This is paragraph 6:

"SAGE is keen to make the modelling and other inputs underpinning its advice available to the public and fellow scientists.

"There are probably more cases in the UK than SAGE previously expected at this point, and we may be further ahead on the epidemic curve, but the UK remains on broadly the same epidemic trajectory. The change in numbers is due to the 5—7 day lag phase in data availability for modelling."

That had progressed, if we move forward to 1778 {C/28/1778} on 16 March we have at the top of the page:

"On the basis of accumulating data, including on NHS critical care capacity, the advice from SAGE has changed regarding the speed of implementation of additional interventions.

"SAGE advises that there is clear evidence to

support additional social distancing measures be introduced as soon as possible."

And then there's a situation update:

"London has the greatest proportion of the UK outbreak. It is possible that London has both community and nosocomial transmission (i.e. in hospitals).

"It is possible that there are 5,000—10,000 new cases per day in the UK (great uncertainty around this estimate).

"UK cases may be doubling in number every 5—6 days.

"The risk of one person within a household passing the infection to others within the household is estimated to increase during household isolation from 50% to 70%."

Then if we move forward to 1803 {C/31/1803}, which is 18 March. Just over halfway down the page it gives the number of cases in the UK. Then at 10:

"The UK is following broadly the same exponential growth rate of cases as Italy, and there is consistency with patterns in other countries.

"There is uncertainty on our exact position, but the consensus view is that we are 2—4 weeks behind the epidemic curve in Italy.

"Assuming a doubling time of around 5—7 days continues to be reasonable, but this is before any of

the measures brought in have had an effect; these measures are likely to slow the doubling time even if there is still an exponential curve."

Then at 1837 {C/36/1837}, 23 March, the last of the minutes I'll be showing you, a situation update at 7 —— I should say:

"7. The data suggests that London is 1—2 weeks ahead of the rest of the UK on the epidemic curve. Case[s] ... in London could exceed NHS capacity within the next 10 days on the current trajectory.

"The accumulation of cases over the previous two weeks suggests the reproduction number is slightly higher than previously reported. The science suggests this around now 2.6—2.8."

That's the R number we've heard so much about recently:

"The doubling time for ICU patients is estimated to be 3—4 days."

This was summed up and you've seen this quoted in our submissions and in the judgment in the subsequent statement that the Secretary of State for Health and Social Care, Matt Hancock, made and it's page 1858 {C/41/1858} and this was in April. He said:

"There was a big benefit, I think, as we brought in the lockdown measures, of the whole country moving

together. We did think about moving with London and the Midlands first, because they were more advanced in terms of the number of cases, but we decided that we are really in this together, and the shape of the curve, if not the height of the curve, has been very similar across the whole country. It went up more in London but it's also come down more, but the broad shape has been similar, which is what you'd expect, given that we've all been living through the same lockdown measures."

And he goes on to talk about the R level, and he says in the last three lines:

"... although the level of the number of cases is different in different parts, the slope of the curve has actually been remarkably similar across the country, so that argues for doing things as a whole country together."

And, my Lords, going back now to 1988 {C/48/1988}, the maps. As I pointed out, you can see that by 16 March the reported cases, again I stress just the reported cases, were virtually everywhere in the country. By 23 March, the only exceptions, I pointed out, was north Devon and one has to remember that with reported cases one is very much looking at the tip of the iceberg, because, of course, for every reported case there will be countless unreported cases which may be

symptomatic or asymptomatic.

Now, the insurers with disease clauses rely on this presentation of the disease to say that no individual reported or known or unknown case anywhere in the country was a "but for" cause of the government action, which of course must be true, because if you've got huge numbers of people in the country infected with the disease, you can take one away and it's not going to make a difference. And so, therefore, they say none of their policies respond even though they cover the disease risk.

Now, for those with 25-mile radius clauses, just for illustrative purposes it's useful to look at the next page, 1989 {C/49/1989}, tab 49. This is just an indication of 25-mile circles in the country. Of course it's just fitting the country into 25-mile circles. Someone on the coast will have a chunk of their 25-mile radius in the sea, which is Mr Kealey's trawler example which he gets so excited about as being the entire answer to the case. What might happen on a trawler off the Scilly Isles.

But it does show, firstly, how large the 25-mile radius actually is. It's 2,000 square miles, just under. But it also demonstrates the artificiality of the points that these insurers are taking, because what

they're saying is that the government was reacting to the national picture and not any particular part of the pandemic and if you select any one circle and assume no COVID cases within it, they say that there would have been no or reduced intervention in that area, but the government, they say, would have -- no cases in that area, but the government would still have acted and there would still have been an effect on the economy, the business in the area would still have been interrupted.

So you can say, for example, the circle centred on Peterborough and it's surrounded by a circle centred near to Leicester and a circle in East Anglia, a circle taking in London and all around it, but if it so happened that in that Peterborough circle there were no cases, they would say that means, on their "but for" hypothetical, you assume no cases in that Peterborough circle, the government would still have acted because the whole of the surrounding area was infected with the disease, unless of course there was some magic impermeable barrier which meant that the disease couldn't cross the circle, which of course as we know isn't true.

Then they say that for each of these circles, any circle you go to, they say "well, you assume there's no

disease in that circle, but disease in all the other circles, the government would still have acted", and so no policy in the whole country pays even though each one of them has countless numbers of cases of COVID within the 25-mile radius.

Of course, if you have a one-mile radius you have far more circles, but the same point arises.

Now, of course an irony of insurers' submissions is if the outbreak started in one of these circles, for example as a result of individuals bringing the disease back from a foreign trip and it's initially addressed locally, there is cover caused for business interruption caused by those local measures. But on insurers' case, the minute the disease outbreak spreads so it is both within and outside the locality and more extreme measures are taken, either regionally or nationally, then suddenly insurers are no longer liable to indemnify, they are free of any insurance obligation because the "but for" test can no longer be satisfied for that particular circle. Because now what's happening in that circle is being caused as much by disease outside the circle as it is by disease inside.

What do insurers with composite insuring clauses say? They say, well, if you take out government action or prevention of access or something else and they can't

really decide between themselves what you take out, but I'll come back to that and they've changed their case on what you take out with monotonous regularity, they say you still have a national pandemic which would have interfered with or interrupted the business and if the government hadn't acted and so, again, no or very limited indemnity is payable.

So they again say although their clauses refer to outbreaks of disease or emergency, they say, "Ah, but the fact is you have the emergency. So even if we take things out you still have the disease or the emergency", and not one single policy in the country pays any indemnity by reference to the government action because, it's said, you would have lost that money anyway or you would have lost a very significant chunk of it.

But of course we have to recognise the reality that the government only acted as it did because of the national pandemic and those composite policies required the action of the authorities to have been prompted by an outbreak of disease or emergency. So what they are doing is trying to escape liability by reference to the underlying cause of that government intervention which the policies themselves contemplated and required.

It means that the more serious the underlying cause of the government intervention in those policies, which

it would have to be to attract national government action, the less cover there is or even no cover at all.

Now, of course this court may find that it is driven to these extraordinary conclusions by the application, and, we would say, the inappropriate and slavish application of a "but for" test, but they would be, we submit, extraordinary conclusions to draw and the answer, we say, is to be found in the true construction of the disease clauses or, alternatively, a true application of causation and the correct identification of the composite peril in those other policies and the correct application of the trends clauses in those policies.

But one aspect of the case which is perhaps the one that has attracted the most attention in relation to the law and also below was the focus of insurers' case is, of course, the causation issue and in particular the role of "but for" causation in insurance and the way in which the "but for" test under the trends clauses falls to be applied. And before I turn to the construction case on the policies, it may be convenient to deal now at this stage in an individual section with the causation issues that have been argued by Mr Kealey and others and that will of course take in the arguments on the trends clauses.

At the heart of their case has always been Orient–Express –– and I appreciate obviously members of this court were involved in that decision –– but it needs, in our submission, to be revisited. The topic has perhaps, I hope, attracted more attention in this case and has attracted more thorough attention from those arguing the case than it did in that case.

Obviously Mr Schaff, when he appeared at first instance, was hidebound by the way in which the case had been argued below because he could only –– "I had to identify errors of law in the court's reasoning" and so he was constrained by the way in which the case had been argued below. So that is an important reminder as to the limitations on the decision in Orient–Express that the argument was conditioned by that.

Now, we have dealt extensively with the Orient–Express judgment in our case and because time is short, unless the court wishes me to have, I hadn't intended to simply repeat the arguments that we've made in writing. What I want to do is just to highlight some points that we say Mr Kealey has overlooked and the judgment overlooked in dealing with the issues.

Firstly, Mr Kealey overlooks, as with respect does the judgment in Orient–Express, that the definition of the word "damage" in the policy actually encompassed its

cause. It was defined –– and I think you've seen this before –– as "damage except as excluded herein."

That is part of the definition and we say that that is shorthand for damage caused by any peril insured under this policy, because it was an all–risks policy and therefore "damage except as excluded herein" means damage by whatever fortuity unless it's an excluded fortuity.

That is consistent and it's unsurprising and it's consistent with the standard requirement for business interruption cover on the basic damage element that the damage should be insured damage. And it is always a precondition of business interruption cover for material damage that the damage is covered either by that insurance, and it usually is the same insurance, but some policies also permit the damage to be covered by some other policy.

Secondly, and perhaps, therefore, Mr Kealey wrongly approaches and Orient–Express wrongly approached business interruption cover in respect of damage as if it was a stand–alone form of cover. And that perhaps is because it is –– I won't say misleadingly, but where it can lead into the error is that it is usually in a separate section of the policy. But one has to understand what the genesis of business interruption

cover was and our textbook extracts which are referred to in our case demonstrate and common sense demonstrates that what this is in reality is no more –– when it's applied to damage –– is no more than an extension of the scope of the indemnity for the damage caused by the insured peril so as to encompass consequential loss.

You'll have seen references in the textbooks to the 19th–century authorities that rejected claims by policyholders for their consequential loss following damage to their property by an insured peril, and the court said, no, the ambit of the indemnity is only the value of the property that's been damaged and not your loss of profits arising from your loss of use of the property because it's been damaged.

The courts made that clear, that that was the limitation on property damage insurance. So, unsurprisingly, a market developed for cover for that consequential loss and if one views it that way, one understands entirely why the insured peril that causes the damage is part of the peril for the business interruption insurance. In fact, you'll see in the authorities we cite that what this was originally called was consequential loss cover and its label of business interruption cover comes in sometime later, but it's the same thing. It's just given a different

description and the earlier description would have given the greater clue to what was actually being done here in insurance policies.

But if you wrongly identify the peril in the business interruption cover as being only damage rather than damage and its cause, you end up with the remarkable state of affairs that in the absence, for example, of a prevention of access or loss of attraction clause there would be no cover at all for business interruption loss in circumstances where, as in Orient−Express, the hotel was closed for two months for repair because of hurricane damage in circumstances where the hurricane itself had caused wide area damage which would have prevented people from coming to the hotel.

Although in Orient−Express, but I'll come back to the point, the court drew comfort from the fact that there was this additional cover, the logic of the conclusion is if that cover had not been there, there would have been no indemnity at all. The answer being the worse the storm that damages the hotel, the less cover you have, which is, in our submission, counter−intuitive and contrary to the essential purpose of insurance and that's really what insurers are complaining about. They're saying, well, we insured

perils but not ones that were going to cost us a huge amount of money. We never contemplated that. Well, that isn't an answer.

Now, my third point is to escape the logic of the reasoning in the case of ——

LORD REED: Mr Edelman, if I can interrupt, Lord Leggatt has a question.

MR EDELMAN: Yes, I'm sorry.

LORD LEGGATT: The fundamental problem, as I saw it and still see it at the moment in the Orient−Express case, Mr Edelman, was that the cover, although you could say the insured peril encompassed the hurricane, it only covered property damage to the hotel caused by the hurricane and interruption from that. It didn't cover interruption caused by damage to other properties around the city.

MR EDELMAN: Quite.

LORD LEGGATT: Now, I can see, however, that subject to the trends clause, which I know you're going to address, one might distinguish the present case if you're right in your submission that the national restrictions can be seen as a consequence of each individual occurrence of the disease, in which case the interruption has been caused by the occurrence.

MR EDELMAN: Well, it is leaping ahead in my notes but

I have no problem with that. The answer to the point my Lord made is this: if one looks at this in terms of proximate causation, you have a hotel that has been so severely damaged that it is closed two months for repair. You also have wide area damage, if I can call it that as a shorthand. There are two concurrent causes of the hotel being unable to accept guests. The first is that it's so severely damaged it needs to be closed for two months for repair. The second is the wide area damage.

Now, applying the proximate cause test, is it really to be said that the damage to the hotel is not a proximate cause of that loss of custom? There are two concurrent causes: one insured, one not insured. It's not excluded. It's just, on this hypothesis, simply not insured. Our submission is that, on orthodox approach to proximate causation, it is sufficient that if a concurrent cause is of equal efficacy, at least equal efficacy, for it to count as a proximate cause and this was of approximately equal efficacy because there's nothing more fundamental to a hotel than the fact that it has to be closed for repair.

So on that orthodox basis you have two equally effective causes and the hotel being damaged is a proximate cause. So you then ask yourself whether the

other proximate cause is to be subtracted from the equation and used in a counterfactual under a trends clause, and that's where one comes in to what the purpose of a trends clause is and we would say that when the concurrent cause is in fact something which is inexplicably linked with the very peril that has caused the damage, that is not something the trends clause is contemplating.

Although I appreciate the court below distinguished Orient−Express, in our submission it is important to understand Orient−Express and, if necessary, identify where it went wrong and, you know, obviously, with as much respect as I can, but I have to say and I do say that it was wrong.

It was wrong for a number of reasons. If you follow through the logic of it, and this was a point I was going to come to anyway, which Mr Kealey has yet to grapple with is —— adequately anyway —— how one rationalised not giving indemnity by reference to damage to the hotel on the basis that the insurers had paid indemnity under two other clauses which related to the external damage. Can I explain this point?

Because if one is applying the insurers' beloved "but for" causation as opposed to the statutory proximate cause test, you have a situation where the

claim under all three clauses fails on the "but for" test. But for the damage in the wide area, the hotel still couldn't have had any customers because of the damage to the hotel and vice versa, so none of them pass the "but for" test.

But Mr Kealey says, well, it would be a breach of contract for insurers not to pay under one. Well, why? If none of them satisfies the "but for" test, then there cannot be a breach. There can only be a breach if there is an obligation to indemnify because each of them is a proximate cause of the loss.

There then becomes another difficulty with Mr Kealey's attempt to extricate himself from I think the decision in Orient-Express from this predicament. Because you then ask yourself: well, if it is a breach of contract if there are three candidates, the hotel and the two clauses that apply to the wide area damage and it is a breach for the insurer not to pay under one of them, why should the insurer have the choice as they elected to choose in Orient-Express to choose the one that is cheapest for them?

Ordinarily, if an insured has the benefit of double insurance, the insured has the discretion which to choose.

So the answer in Orient-Express ought, on

Mr Kealey's analysis, to have been that the insured was entitled to choose and the fact that the insurers had chosen to pay out under the extensions which were more favourable to them because they had a lower limit of indemnity is nothing to the point, because if there is a choice then it's the insured's choice. It's can't be the insurer's choice. That really would be heresy.

The only way one rationalises this -- and this is why it's important, in my submission, to understand how it is rational -- if you rationalise it on the basis that the primary causation test on the basis that one does the orthodox thing in proximate causation, which is to identify whether something is the or a proximate cause.

The other consequence that Mr Kealey failed to address were the arguments we made about the claims by policyholders for windfall profits, and we've set this out in our case and he simply hasn't addressed it. It would mean potentially, if he's right, that if the hurricane or the peril that causes the loss is left in, that each policyholder can claim for the windfall profits of being the only hotel or the only shop in town. And we gave this example in the Cockermouth storms case, where the main street in Cockermouth was taken out by a flood. And if each shop is entitled to

say, "well, the hypothesis is that we remained undamaged but the flood was still there," they would be the only open shop in town and, no doubt for that reason without any competition from any other shop, able to charge extortionate prices.

It's even more so in the Orient-Express case with a hotel that can charge premium prices for all the construction workers who are now having to come to the area to repair all the damage and it's not just the Orient-Express hotel, every single other hotel in the region would fall to be indemnified on the windfall profit basis because the hypothesis is they are the only hotel left standing in a hurricane-devastated region.

Now, the US courts are not noted for being unfavourable to policyholders, but they have baulked at that and they have construed trends clauses as including the peril for the very reason that otherwise you get this windfall profit case. As I said, Mr Kealey just simply has ignored that in his submissions.

What we submit Mr Kealey also ignored was the pre-Orient-Express consideration in the leading texts on business interruption as to the origin and commercial purpose of trends clauses and how they should be and had in practice been applied into cases of wide area damage. And they addressed both hypothetical facts and the

practice of insurers.

Now, Mr Lockey in his submissions said that there was nothing which addressed wide area damage in particular and he was wrong about that. If I can just take you to the text on that. It is in bundle G and it's at -- if take you to page 2165 {G/106/2165} and this is sideways on in my hard copy so I hope it's legible for you in yours and not sideways on. It's tab 106 for those with hard copy.

It's an extract from a 1990 book by Hickmott, who is one of the leading authors on business interruption and it's Interruption Insurance Proximate Loss Issues and I have a hunch that this wasn't referred to in Orient-Express.

At the foot of page 27, the second page of the double page copy, paragraph 34, this is under the heading of 32 "Area damage" {G/106/2165}:

"... the attitude of the English Courts in insurance cases has to be considered.

It is well known that they do not accept technical frustration of policy cover by an unintended exclusion especially if this is not apparent at the time the contract was arranged. The principle of 'good faith' applies equally to the insurers as well to the insured and this has been made clear by Castallain v Preston ...

and Carter v Burn."

Then he says at 35:

"Appendix A case studies IV and V outlined what is considered to be the UK market intention of the cover given and which it is considered would be adopted by the Courts if it was ever submitted to them."

And if we go to page 2170 {G/106/2170} you'll see the example he considers is "Hotel and Access Bridge Damaged by Storm."

Below that it says:

"Own Damage, Area Damage, Parallel Loss, Exclude Aggravation."

And then you see a diagram which actually shows a full recovery of income during the period of damage and reduced income obviously following reopening. That's explained under (IV):

"The normal case but with widespread area damage from the same insured peril.

The cover under the policy provides for:

The interruption flowing from the specific insured peril damage to the insured premises (including customer effect and aggravation to repair or renovation by the surrounding general circumstances) on the quantum level basis of turnover that would have applied had the area damage not taken place for an indemnity period which

relates to the time that the insured's own damage only would have affected the trading of the business.

It does not include loss from:

(i) Aggravation of the 'Customer' effect from the widespread nature of the damage.

(ii) aggravation of the loss beyond the indemnity period is calculated above from loss of slice which are part of the trading activity."

And if I can skip to (v):

"Aggravation of the loss by order of Public or other competent Authority beyond that relating to the time to achieve repair or replacement of Capital assets and recover trading against the specific insured damage."

So he was unfortunately incorrect in predicting what the courts would do but certainly seemed to have no doubt that the intention of these clauses and how the court would be expected to apply them in accordance with the purpose of these clauses in a wide area damage case was to indemnify the hotel for its loss of income during its period of closure by reference to its normal turnover figures, but exclude any aggravating factors other than in the period of delay that the wide area damage might have in relation to the recovery of the business from its closure.

What we see from the commentaries on Orient-Express

which are cited in the judgment at paragraph 528 at page 178 in bundle C {C/3/178} is that part of the criticism of the Orient-Express decision was that it wasn't, in fact, in accordance with the practice of the insurers, and the example was given was how the insurers had settled the Cockermouth flood:

"... insurers did not seek to argue that none of the businesses would recover ... would have been closed and effectively a building site for approaching six months, anyway."

And that was the point he made.

Now, of course, subjective intentions I accept are not relevant but what we're dealing with here is the commercial purpose of trends clauses, and we submit it's quite apparent from the textbooks what the commercial purpose is and it is to deal with the extraneous things in the world that would have affected the business. The example that was given in court was the restaurant that is affected by a fire but the head chef of this Michelin-starred restaurant had given in his notice a week before or was about to give in his notice in any event and did so the week after the fire. Those sort of unrelated to the peril events. Strikes, lockouts, as it happened so frequently, fortunately now, but that sort of thing, which are extraneous to the insured peril.

And that's what that textbook was talking about and that's how this all developed.

So we don't shrink from saying that Orient-Express has construed and applied trends clauses without regard to their true commercial purpose and that also infected the reasoning on causation, because the judgment of my Lord Lord Hamblen on the causation section when one goes to the reasoning on a number of occasions refers to the trend clauses as support for applying "but for" causation at the primary proximate cause stage.

But, in fact, when one has concurrent causes which are associated with the same peril, the trends clause isn't dealing with that at all. That's not what it's there for, and so you can't use the trends clause as was used in the case as a rationalisation or justification for applying "but for" to proximate cause.

We gave in our case an example of the Buncefield explosion -- and for those of us who live on the north side of London will remember being woken up by a large bang and seeing a huge cloud of smoke -- and there was in fact a warehouse about 800 metres away which was badly damaged by the explosion and the logic of the argument that insurers run now and that was adopted in Orient-Express is that there would be no or very limited indemnity for that warehouse for its loss of turnover

because of the effects of the explosion on the surrounding area.

Whereas, if a boiler in the warehouse had exploded causing either the destruction of the warehouse or part of it to be destroyed, it would have received a full recovery. So, in other words, the worse the explosion that affects the building, the less the cover. And that is simply not a sensible approach to that causation, and that's why we say, standing back, the sensible approach to primary causation, and this is important to insurers' attempt to introduce "but for" into the proximate cause stage for all their clauses, so it does have significance.

Standing back, the correct analysis in Orient–Express would be that a proximate cause of the business interruption was the damage to the hotel. I say "a proximate cause" because it's quite obvious that there was a concurrent proximate cause of the wide area damage, but the concurrent proximate cause that is covered is sufficient to pass the primary causation test and then the trends clause isn't interested in things that are associated with the peril that has caused the damage to the hotel.

Now, as that example in Hickmott explained, that doesn't mean that you are insured for all of the

consequences of the hurricane, and that's never been part of our case and it is frequently mischaracterised by the insurers. What we say is -- this is relevant for in particular the composite cases -- that as that textbook demonstrates, during the period that the hotel is closed, you look at what its revenue would have been in normal times had it been open and you do not take into account the fact that the wide area damage because of the hurricane would itself have reduced the customers. So you don't use the hurricane as a reducing effect on the loss that is referable to the interruption attributable to the damage.

That is, we say, the correct approach as a matter of law and construction to proximate cause and the trends clauses and it's equally applicable to this case.

Now that leads me on to Mr Kealey's attempt to support a "but for" test at the primary causation stage because he needs that to overcome my concurrent cause argument. He said, well, Mr Edelman's concurrent cause argument fails at the first hurdle because the first thing one asks is what would have happened but for the disease within the policy area?

The authorities he refers to for that proposition, with respect, do not support it. Endurance doesn't say anything about "but for", it's merely the basic purpose

of an indemnity to make good the loss, but it doesn't say anything about concurrent causes of loss.

The high–water mark of his submissions appeared to be was below the Blackburn Rovers case which Mr Kealey did refer to briefly in his submissions. We've dealt with it fully in our case. We have explained in our case why it doesn't support his submissions. He's not answered them and it's because there isn't an answer because the court actually did apply proximate cause and there's a fleeting reference to the "but for" concept in relation to the question posed by a particularly worded exclusion. But the court started with and returned to the proximate cause test and answered it by reference to that. But, as I say, what we've said in our case is not questioned.

My Lord Lord Hodge refers to the "but for" test in passing in the McCann case. It doesn't appear that there was any argument about the point. The case didn't turn on it and we say, with respect, it doesn't reflect the way that insurance cases deal with it.

One new case Mr Kealey referred to was Reischer v Borwick, and a passage in the judgment of Lord Justice Lindley at pages 831 to 833. That case was about whether the sinking of a ship as it was being towed to dock for repairs was indemnifiable in

circumstances where the vessel had collided with an underwater hazard and had been temporarily repaired but that repair failed during the ordinary conditions of the journey; no perils of the sea.

If you read the judgment, you'll see that Lord Justice Lindley resolved the issue purely on the basis of proximate cause holding that the original conclusion was a proximate cause of the sinking. If you read the other two judges, Lord Justice Lopes and Lord Justice Davey, they exclusively refer to proximate cause. What in reality has happened here is that Mr Kealey and his legal team have trawled through the totality of insurance cases on proximate cause looking for a fleeting reference to a judge using "but for" language and has said "This is it, this shows you that 'but for' is an essential part of the causation test", but on analysis the two main cases, the Blackburn Rovers case and Reischer v Borwick simply do not support it.

LORD LEGGATT: It is fair to say, would it, Mr Edelman, that the vast majority of the insurance cases the cause is going to be a "but for" cause, that's the normal situation. You're then going to be looking for, like in Reischer v Borwick, how far back can you go for the insured event still to be a proximate cause? That's a typical insurance enquiry. So one might find language

used that is talking about "but for" just because that is what the normal situation is and probably what the facts of any particular case are. It's quite hard to think of many concurrent cause cases in the insurance context. It doesn't mean that principle doesn't apply.

MR EDELMAN: Well, certainly Mr Justice Butcher, who was the author of a chapter on causation in one of the insurance textbooks, was struggling with the concept that insurance law has a two-stage test. What we would submit is that the proximate cause test is the statutory test and it is applied in a sensible way and that may mean on the facts of a case that a cause that is not a "but for" cause fails to be a proximate cause, but the test remains: is it the or an effective cause of the loss?

One has to bear in mind what it is that the insurers are trying to do. They are trying to defeat my alternative concurrent cause case by saying that it fails because of "but for" causation. So they are trying to introduce it as, in effect, an exclusion, a sort of Wayne Tank type of exclusion, that isn't actually in the policy.

So that's why one has to understand that it is of critical importance to insurers' case to elevate the "but for" test to something which does have this

exclusionary status where that has not been part of insurance law. Let me give you what I hope is a recognisable example.

If one has an insured who is facing a number of claims and only one of those claims is insured but he incurs defence costs which are common costs in the sense of commonly incurred for the defence of all of the claims, an insurance lawyer applying the proximate cause test would say that the insured claim is a proximate cause of those costs being incurred and if the other claims are not excluded claims, you are entitled to an indemnity.

That is what I would call the standard application of the proximate cause test, and there are authorities to that effect. That is what happens with defence costs. It's no answer to say that the insured was also facing uninsured claims. You can't prorate the costs; it's all or nothing. But insurers would say but for the -- if you assume that you haven't had the insured claim against you, you would still be incurring the costs and on that logic there is no indemnity.

But one may understand that that sort of principle is relevant if you are awarding damages to someone for an injury they've suffered and they would have suffered the injury anyway for some other reason, but that is why

you can't import into the law of insurance principles that are recognisable and applied outside of insurance, because one is dealing with a different type of contract. It's a contract that insures against particular risks occurring and the principle on which the law has operated is if there are concurrent causes, one of which is insured and the other one is uninsured but not excluded, you're entitled to cover.

There's a case that we cite in Australia, the Federal Court of Australia, McCarthy, where the insured was facing 39 claims by lenders, it was one of these mortgage cases, but three of them did not involve allegations of fraud. It did not involve -- were therefore covered by the policy. There's an issue about whether or not they were excluded.

But the insured was entitled to an indemnity for all of the common costs on the basis that three of them were insured. And there's nothing unorthodox or surprising about that, and that of itself demonstrates that "but for" causation isn't a basic hurdle that an insured has to cross. You needn't enter into the debate about whether it is or isn't in the common law for breaches of tortious or contractual duties, there are arguments about that and we've cited some authorities which say that this is all the creation of academics and the

courts don't actually operate that way, but certain -- yes.

LORD HAMBLEN: So the challenge laid down by Mr Kealey for you, Mr Edelman, was whether there is an example of a case in the English authorities where proximate cause is found but "but for" causation could not be satisfied.

MR EDELMAN: Well, all the defence costs cases.

LORD HAMBLEN: Right.

MR EDELMAN: All the common costs, defence costs cases, because in all of those cases, the costs would have been incurred but for the insured element of the claim.

LORD HAMBLEN: Is there a decision that you can show us to that effect?

MR EDELMAN: I don't think they're in the bundle, but most recently it was considered by this court in Zurich v IEG where Zurich was held liable for all of the costs of the defence of the claim even though on the hypothesis -- this was on the hypothesis it was a Guernsey claim and so it was only liable for the exposures -- it was only liable to indemnify for the contribution to risk during its period of insurance.

The insured was facing claims for a whole range of -- well, I think it was 27 years of exposure, only six of which were insured by Zurich. Zurich would have been entitled to say: well, if but for those six years

when we were on risk having been included in the claim, you would still have incurred these defence costs. So the defence of the claim in respect of those six years was not a "but for" cause of the defence costs.

I was thinking of the New Zealand Forest Products case where there were six directors who were being sued, only one of them was insured. I think that may be a different point, I think that was a question of whether it was for the benefit —— the insurer had to pay the indemnity even though the costs were also for the benefit of the other directors, but certainly that's been the principle.

If the Federal Court applied English law for the purposes of this and it's in the authorities, I'll give you the reference in a moment, but it was applying English proximate cause law to it and it would be startling if the example I gave of six claims —— let's say six claims only —— one insured, five uninsured, and the insurer to be entitled to say: well, but for the insured claim, you would still have faced the uninsured ones. Because that would be introducing into the policy an exclusion that isn't there. It would be Wayne Tank by the back door.

Now, the case I was referring to, the Australian case, was a case called McCarthy.

LORD REED: Lord Briggs has a question for you.

LORD BRIGGS: Can you hear me all right?

MR EDELMAN: Yes, I can.

LORD BRIGGS: Is this possibly an illustration of a wider point about legal tests, such as "but for" causation, that they are good servants but occasionally poor masters?

I have in mind that we all used to think that you applied for the purposes of quantifying damage, in contractual cases anyway, a breach date principle but then we all discovered in the SAAMCO case that actually that was a good servant, but there were occasions when it didn't produce the right result because it didn't conform with the underlying principle pursuant to which the compensation was to be awarded, and I'm just looking at "but for" in this insurance context.

If the underlying statutory principle is proximate, or whatever you want to call it, effective cause, which admits cover where there is a parallel interdependent or independent, we haven't got there yet, but where there are multiple proximate causes, then in that particular perhaps unusual context, the "but for" test, as a tool in the process of quantification in the trends clause may be a poor master.

MR EDELMAN: Well, my Lord, I would submit that

an alternative approach —— and there's certainly some support for this from the High Court of Australia and adopted here in the appeal case of Galoo, which we cite in our cases, which is to say that each area of law has its specified causation test and in insurance it's the proximate cause test. It may be very similar in most areas of law, but in insurance it's statutorily codified as the proximate cause test and one has to apply those causation tests sensibly.

Applying them sensibly may on occasion involve the application of "but for", but that would be because it was the sensible thing to do in that case. The problem becomes if one had —— I accept what my Lord said —— the problem arises if one treats the way in which one answers causation questions as involving a series of exam questions, a series of hurdles that have to be overcome, that then leads you into error because you start approaching something which should be a standing back and making an assessment of the facts has A caused B or was A a cause of B? It stops you doing that and starts you on a series of multiple choice questions, which may not lead you to the correct answer.

The reason why we submit that "but for" hasn't featured —— it may be there are not many cases on concurrent cause, but even then it hasn't featured as

an element of insurance jurisprudence, is simply because the courts have been able to say well, this is what a proximate cause is and we recognise one when we see it because it will always be a question of fact in each case whether something is sufficient to be a proximate cause. We know what we're looking for, we're looking for something which is the or an effective or dominant cause, it may not be dominant, but can be an effective cause if there's more than one cause. We know what we're looking for and it's just a matter of finding it.

It's a case that we submit has rather more significance than the courts gave it and more significance than insurers give it, which is the Silversea decision, sometimes referred to as The Silver Cloud, but I think actually, because it wasn't about a vessel, it should be referred to as the Silversea. That case, as you may have seen from our case, involves the 9/11 terrorist attacks and that is then followed by government warnings and I think at this stage it's important for the court to see the clause that was being applied, so if we could go to that at bundle {E/18/397}.

We see that the cover under A(ii) was for:

"Loss of anticipated income and extraordinary expenditure incurred ...

"To cover the ascertained net loss result from a State Department Advisory or similar warning by a competent authority regarding acts of ... terrorist activities, whether actual or threatened ..."

So the trigger was "State Department Advisory or warning", but the context was a warning reacting to certain things, which included actual terrorist activities, which obviously 9/11 was.

There were, in fact, a series of warnings and it's right that of course each warning was dependent on the occurrence of the terrorist attacks, but the terrorist attacks necessarily came first and their effect was not specifically —— was not the final element of the trigger. It was part of the causal chain, but it wasn't the final element in the equation.

The attacks themselves would necessarily have had some effect on the willingness of people to go on cruises, even if the government hadn't issued warnings and this has echoes of insurers' "but for" test.

But you can see this being dealt with in the judgment at 420, going forward to there {E/18/420}.

Paragraph 67:

"[Insurers'] pleaded case was that any diminution in business after the 11 September attacks was attributable either wholly or in overwhelming part to reaction to the

attacks themselves, rather than to any official warnings issued in their aftermath."

Exactly the case that insurers are putting here. Saying, well, what we insured was the warnings, but the customers would have stayed away anyway because of the attacks:

"In support of this case [they] relied on the expert opinion of Mr Brian Gibbs ..."

You'll see at the end of the paragraph, he said:

"... deterioration and demand... was caused primarily, as to 80—90 per cent by the terrorist attacks themselves and only to a much lesser degree, 10—20 per cent by the State Department Advisories and similar warnings."

The judge says, Mr Justice Tomlinson:

"From the outset this approach stuck me as unreal ..."

If we go to the next sentence:

"It is simply impossible ..."

This is where the judge or court below gets it:

"It is simply impossible to divorce anxiety derived from the attacks themselves from anxiety derived from the stark warnings happenings issued in the immediate aftermath thereof. In relative terms very few people will have had any knowledge of the attacks apart from

what they learned of them from the media reporting."

Then it talks about images of aircraft had a profound impact:

"... but few people will have watched coverage of that sort without also being exposed to the warnings and the media exposition of the warnings which swiftly followed. Part of the media coverage of the 11 September was the dissemination to the American public of warnings from the United States Government and other responsible authorities."

He then continues at the foot of the page in relation to Mr Gibbs:

"He accepted that it would have been a difficult assignment to consider 9/11 divorced from the media coverage of 9/11 ..."

Top of the column:

"However, I think that the logic of that compelled that conclusion similarly compels the conclusion that it is impossible to divorce the effect of the warnings from the effect of the events which they so swiftly followed."

So impossibility of dividing things up is something that was taken into account and it was properly taken into account. He then goes on to say, a few lines down:

"Dr Gibbs acknowledged that there was undoubtedly

an interactive effect between, on the one hand, the attacks and on the other hand, the warnings. Notwithstanding that interaction he thought it possible to separate out the different factors and to assign to them a different weight in terms of their impact on decision making."

This is an exercise that insurers are suggesting in this case that loss adjusters would be doing:

"Dr Reddy ... thought that this was not possible and with genuine respect for his training and experience I do not consider that I really needed his careful evidence to lead me to the same conclusion. I am also I am afraid unable to regard attribution of relative causal effect in percentage terms as anything other than arbitrary. Dr Reddy could not understand how those percentages could be derived and nor can I."

Then he goes on at 69:

"I also note in passing that since, as I find, and as was common ground between the two experts, the events of 11 September and the warnings were concurrent causes of the downturn in bookings, including cancellations thereof, and since the consequences of the events of 11 September ... are not for the purposes of section A.ii excluded from the ambit of the cover, as opposed to being simply not covered, a claim under the policy must

lie."

So what we have here is he's treated what I would call the originating concurrent cause, because these are actually successive concurrent causes: We have the attack which prompts the warnings, he says the original attack and the warnings are concurrent causes and because the attack is not excluded, there is cover. It does not say, "but I have to apply a 'but for' test even though it's not excluded and say what would the loss have been but for the warnings?" Which also supports our approach on the composite policies.

Now, let's imagine that there had been a trends clause in Silversea, as there doesn't appear to have been one. Is it really going to be said that the decision that the court reached on causation is then undone by the trends clause? That the purpose of the trends clause is to revisit causation questions that have already been answered at the primary causation stage.

We would say self-evidently that is not the purpose of the trends clause, and that a trends clause would have made no difference here and the history of trends clauses and their genesis and the reason for their introduction makes that plain and also you've been shown some of the trends clauses and you can see that they are

all about mathematical calculation.

They're to help with the precise calculation of the amount of the loss and to find in clauses which are looking for calculations of standard revenues, standard gross profit and so on, defined -- and making tweaks to those figures so they reflect what the reality would have been. Because that's what these various clauses are doing, they're trying to say what we are trying to do is recreate the real-world -- real, normal situation -- and that mathematical exercise that those clauses are focusing on somehow revisits and reintroduces the causation test. We say it's just fundamentally wrong.

We also say that that Silversea is a good example of causes only -- the second cause was dependent on the first, but they weren't interdependent. The first cause was not dependent on the second. That's why we say well, actually, it's not just interdependent, as in Miss Jay Jay where two causes have together combined to cause a loss, we have here two interlinked concurrent causes. It was said in submission that I have no cases on interlinked concurrent causes. These are interlinked concurrent causes.

As I say, although one is dependent on the other, the reverse is not true. The attacks could have caused

and were alleged by insurers to have caused significant losses by themselves, but the court decided they were interlinked. Their effects were impossible to separate. They are concurrent causes. The attacks are not excluded and they are contemplated by the clause.

That's what takes them outside the trends clause because, whether you define it as insured peril or not, semantics, it doesn't actually matter, it's the precise thing that the clause contemplated would be the trigger for something else to happen and cause loss. It's the unusual thing. The out of the ordinary thing. It can be a 9/11 attack, it can be an emergency, it can be an outbreak of disease. That is what the clause contemplates as being the exceptional unusual thing that will happen that will set in motion a chain of events.

Trends clauses are looking for things that are normal world things, like the chef leaving, like a strike somewhere, because they are trying to recreate the normal rule.

LORD HAMBLEN: So I have an argument, Mr Edelman, can you give us an example of how you put it on construction wording?

MR EDELMAN: Yes. Can I give you that? I was going do it probably best for -- I will take the wording that Hiscox relies on because it uses the word "restriction". I'm

not going to do what insurers do and take the one that is easiest for me, as Hiscox and other insurers tried to do.

So I hope this is going to be a good example. If we go to Hiscox 1 at -- it's bundle {C/6/380}, which is the definitions, and the correct page -- I just want to show you where we were in the policy, that's property definitions.

If we go to 381 {C/6/381} the gross profit. Gross profits is:

"The difference between the sum of your income, closing stock and work in progress and the sum of your opening stock, work in progress and uninsured working expenses."

The definition of insured damage:

"Damage, other than failure... during the period of insurance provided:

The damage is not otherwise excluded by the buildings, contents and other property section of this policy."

Then we've got on the next page {C/6/382} "Uninsured working expenses."

Then on the following page {C/6/383} we've got the insurance cover. 383, sorry. We've got:

"We will insure you against damage occurring during

the period of insurance ..."

We know this is an all−risks cover.

Then we go to page {C/6/399} for the business interruption cover.

We've got "Additional increased costs of working" to minimise loss of income. We've got "Increased costs of working" further down the page.

Then we've got the rate of gross profit on page 400 {C/6/400}. Just showing you the calculations, some of the calculation methods, to show you what it's about. What is covered:

"We will insure you for your financial losses ... [for an interruption] caused by ..."

Number 1 is:

"Insured damage to property."

This is page 400 {C/6/400}. So, as I indicated, the business interruption is only for insured damage to property.

Then, if we go forward to page 403 {C/6/403}:

"How much we will pay

"Loss of income

"The difference between your actual income during the indemnity period and the income it is estimated you would have [received] during that period or, if this is your first trading year, the difference between your

income during your indemnity period and during the period immediately prior to the loss, less any savings resulting from reduced costs ..."

Et cetera. And:

"Loss of gross profit

"The sum produced by applying the rate of gross profit to any reduction in income... plus increased costs of working."

Then at the foot of the page:

"Business trends

"Provided that you advise us of your estimated annual income, or estimated annual gross [profit] if applicable, at the beginning of each period of insurance, the amount insured will automatically be increased to reflect any special circumstances or trends affecting your activities, either before or after the loss. The amount that we will pay will reflect as near as possible the result that would have been achieved if the insured damage had not occurred."

Now, I should say I took you to that because I forgot that it was one that didn't have restriction. If we go to 432 {C/7/432}. No, I didn't do that deliberately, I just misrecollected that Hiscox 1 didn't have that wording. You'll see the trends clause is:

"... insured damage or restriction had not

occurred."

Now, we say that "insured damage" in that clause is referable to the definition which you saw (inaudible) which is, as its word describes, referring to damage to property which is caused by an insured peril.

So in the Hiscox wording, the need for the peril is actually introduced into it and where the language includes also "restriction", the court rightly held that that was a shorthand for a general reference to all of the ingredients of the peril and Mr Gaisman has not developed any submissions to the contrary about that.

You'll have seen that what the court says and what we have said about that and although his submissions effectively admit that it can't be just the restriction itself because he accepts that it's the restriction and the disease insofar as it caused the restriction.

What we see here is a trends clause which is purely a quantification exercise and insofar as damage, it's perfectly clear that our policies refer to "damage" but it's got to be covered damage, but it's contemplating the damage that is insured in the sense of caused by an insured peril. We say that one construes that policy −− that clause −− bearing in mind what it's there to do.

What is it trying to do? Is it reopening −− let's

go back to the trends clause. One can see that it is actually described at the foot of page 403 {C/6/403} as "Business trends". You know, Mr Gaisman was very keen on his public authority description. Well, what's sauce for the goose is sauce for the gander, but I don't need that because that's what this is doing.

Yes, it referred to special circumstances or trends, but are special circumstances part of the insured event, I'm using that as a loose word, the insured contingency, the insured risk? Is the insured risk a special circumstance, the occurrence of an element of the insured risk, or is that looking for something that's special that's out of the ordinary in the normal world that would falsify the picture given by the previous year's figures?

LORD LEGGATT: One possible way of looking at it, Mr Edelman, that when you're asking what would have been achieved if the insured damage hadn't occurred, you've got on a reasonable construction, you say not just to take out a very narrow view of the insured damage, but to take out, as it were, what wouldn't have happened if you hadn't had the insured damage, so to speak. The inextricably surrounding circumstances.

MR EDELMAN: It's my Buncefield −− putting it more locally −− it's the Buncefield explosion point. Do you

just take out the fact that the factory has been demolished and leave in the explosion, which is utterly unreal? A warehouse 800 yards away from an exploding oil refinery —— this is what we talk about unrealistic hypotheses —— is somehow miraculously left standing?
LORD LEGGATT: The fact it's unreal isn't in itself a bar.
MR EDELMAN: No.
LORD LEGGATT: The point really is, isn't it, that you want to put an interpretation on the trends clause that aligns it with the effects of the insuring clause in the policy, including the causation element?
MR EDELMAN: That's right. We're trying to make a coherent framework. We're trying to understand what this is getting at in that consistently with the insurance, as what the insurance is aimed at, and so as to make it a sensible construction. And that involves certainly —— and we've never shied away from this —— a "but for" element, but it's always a question of: but for what? And is it but for something that is either the peril that's caused the damage or, in our composite peril cases, part of the required sequence of things that must happen? You must have an emergency which must prompt government action which must prevent access.
The starting point of all that is that you've got something unusual or exceptional that's happened. It's

the equivalent of a storm, really. A storm can pass you by without causing damage yet it may cause you damage. Here you've got an emergency which is such a serious emergency that it has caused government action which has prevented access.
Now, when you do have such an emergency that has created that situation, is the trends clause really about revisiting any causation test you've done at the primary stage and say "Oh, now, we didn't —— the causation test was satisfied at the stage, but now we're going to revisit that and start taking out on a but for causation basis bits of the very exceptional event, the sequence of events that the policy contemplated"? That doesn't fit with the purpose and the structure of the policy.
It's not a forced approach to the trends clause, because it sits very consistently with where the trends clause sits. It sits in the midst of the accounting provisions —— and I don't want to demean what loss adjusters would do, but it is the bean counting entities (inaudible) where what one is trying to do is to create a realistic figure for what the business would have earned. That's what the trends clause is trying to do, it's just trying to get a realistic figure for what the business would have earned. But in what circumstances?

We say in the normal world, taking into account the ordinary vicissitudes of business life that your key employee might walk out the next day, that a competitor might open up next door.
You may have a fire at a premises and a competitor had just opened up opposite the week before. Well, obviously a loss adjuster is going to say "Well, it's a special circumstance here. Your revenue from last year is not going to be a reliable indication of what your revenue would have been in the post—fire period because you're not comparing like with like, you're comparing the period without competition to one where you have competition on the other side of the road". And that's what the trends clause is doing.
To ask it to do more than that is ——
LORD BRIGGS: Mr Edelman, can I just test your analysis against a concrete example? I'm assuming you're applying it to prevention of access clauses as well as to just plain disease clauses, am I ——
MR EDELMAN: Yes, indeed.
LORD BRIGGS: Well, you must be, I think. Take a travel agency which sells holidays which are rendered impossible by government action, but which is then also closed down by government action in circumstances where it could probably carry on its business equally well by

its employees all working from home. It's a fairly extreme case designed to illustrate where, what you call the originating unusual event, here the epidemic, causes a business interruption, not because of anything do with the closure of the premises, but because effectively of the destruction of the market for the services which it's in business to sell.
Now, how does your analysis, that you had to remove the whole of the epidemic from the counterfactual because it's an originating cause of the prohibition of access that can't be separated from it, work in that situation where I think a reasonable man would say, "Well, the cover wasn't intended to cover us from that kind of market loss"?
MR EDELMAN: My Lord, we did deal with this in our case with a similar analogy when we dealt with the loss of donation to the church. People might donate by coming to the church and putting money in the collection box or there was this other case of someone giving quarterly donations without coming to the church. And we accepted that the loss of donations in the person not coming to the church, because his restaurant had to close down because of COVID, was not, as it were, access—related. It's not an access—related loss.
Our intention in this counterfactual is to defeat

the case where what insurers are saying is even if your travel agency hadn't been closed, people still wouldn't have come to you because of their fear of COVID.

Now, that's the access-related issue and with a travel agency, it may be that they are going to struggle. With other businesses, it's more significant. Anybody selling something, a bookshop, when people can't come to the bookshop and buy books because the bookshop is closed, insurance want to put into the counterfactual that people would not have come to the bookshop anyway because of the epidemic, restrictions in movement on them, or their social distance, whatever. They say the epidemic would have caused those people not to come anyway. That's what we want to exclude from the counterfactual.

It is a mischaracterisation of the submissions to say that we want everything in, because the first thing the insured has to do is to prove what it's access-related losses were and what insurers are trying to do is to say, "Well, these may be your access-related losses, but you'd have had those losses anyway, because of the epidemic, people wouldn't have wanted to come to your shop," which is a different question to the one my Lord asked.

So I'll stand to be corrected by those instructing

me, but if there was a loss of holidays anyway and that's not access-related, then that will be difficult to see how that is anything to do with prevention of access.

LORD BRIGGS: Thank you.

MR EDELMAN: But what the insurers try to do, they say ah, Mr Edelman is wanting us to give indemnity for all COVID losses. That's not what I'm submitting. I'm saying when you've got your prevention of access losses, you don't reintroduce the effect that COVID would have had on those access-related losses. It then just becomes a concurrent cause of those insured access-related losses and the trends -- because it's the contingency that the policy was contemplating, it doesn't fall to be excluded.

My Lord, I think that was what I wanted to say about causation. I have five minutes left, if you're content for me -- unless you'd have any more questions about causation. Although I've taken a long time on it, in a sense it answers quite a lot of the hybrid policy and composite peril policy questions, but I'll revert to those if necessary.

Just if I can use my last few minutes on saying a few words about infectious diseases. If you're dealing with outbreaks of infectious or contagious

disease, one has to ask: what is one insuring against?

Firstly, if you're dealing with something occurring not at the premises but at some distance from the premises, whether it's 1 mile or 25 miles, you are necessarily not addressing something that would have itself directly affected the premises. Rather, you must be contemplating something else happening which affects a wide area and has an effect on the business, in a sense indirectly, most obviously through the reaction of the authorities, but it could also be the reaction of the public. I say "indirectly" because it's not the disease itself that affects you. If something happens in the middle, it's public reaction, authority reaction to the disease that then affects your business. So we're talking about contemplation of indirect effects of the outbreak to its effects on the authorities or third parties.

Furthermore, none of the policies that you have seen impose any restriction on the geographical scope of any such reaction, for example, by the authorities. There's nothing that requires or contemplates the reaction to be confined in its effect only to the relevant policy area and it must be contemplating, at least potentially, a wider scope. Now, the critical point for coverage purposes is whether that affects the insured in the way

required by the policy.

And, secondly, I think I can just squeeze this point in, part of it anyway: the character of the disease risk. The policies that address the disease risk are confined to notifiable diseases and we've looked at the definition of that. These are diseases that are singled out for special treatment in the public health legislation and in the policies because of the health risks they pose, and because action by the authorities which could impact the business may be necessary to deal with the impact of the disease and prevent or minimise its further spread.

At the forefront of these health risks is, of course, the risk of the disease being an epidemic, and I say "at the forefront" because that obviously is the most catastrophic form of the outbreak of the disease that can occur, but that is within the range of the peril that is contemplated by the policies that refer to a notifiable disease.

It will be 4 o'clock in about or 15 seconds and I won't have time, I think, for another point, so, my Lords, if that's a convenient moment. It's the end of that sub-point.

LORD REED: Yes, certainly. That is a convenient moment. Well, we'll look forward, then, to hearing you further

tomorrow morning at 10.30 am and in the meantime we'll adjourn.

(4.00 pm)

(The court adjourned until 10.30 am on Wednesday, 18 November 2020)

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